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CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

LUIS OSCAR SARMIENTO-PEREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment of the United States Constitution and the existing case law of the Supreme Court of the United States obligated the Circuit Court to decide Petitioner's claim of evidentiary insufficiency notwithstanding the fact that the Circuit Court reversed the conviction of Petitioner on the grounds of procedural trial error?

2. Whether the Circuit Court erred in affirming the lower court's denial of Petitioner's pretrial motions to dismiss the indictment on the grounds of double jeopardy when the legally competent evidence presented by the government at trial against the Petitioner was insufficient to sustain a conviction?

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CASE NO.

in the Supreme Court of the United States

OCTOBER TERM 1981

LUIS OSCAR SARMIENTO-PEREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, LUIS OSCAR SARMIENTO-PEREZ, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on February 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals printed in Appendix "A" *infra*, (App.* 1-6) is reported at ____ F.2d ____ (5th Cir. 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1982, Appendix "B" *infra*, (App. 7, 8). A Petition for a Suggestion for a rehearing en banc was filed in March, 1982, and was denied on April 15, 1982, Appendix "C" *infra*, (App. 9, 10). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22, Rules of the United States Supreme Court.

STATUTES INVOLVED

The Federal Statutory provisions involved, 21 U.S.C. 841(a)(1) and 846 are set forth in Appendix "D" *infra*, (App. 11, 12). The statutory authorities for interlocutory appeals from pretrial orders directed to non-frivolous double jeopardy claims, 28 U.S.C. 1291, is set forth in Appendix "E" *infra*, (App. 13).

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*numbers in parentheses prefaced by App. refer to pages of the Appendices.

STATEMENT OF THE FACTS

On December 11, 1978, the Petitioner herein was indicted with Roberto Antonio Aguilar, Laurel Ybanez and Jose Cantu, Jr. by the Grand Jury, Southern District of Texas, Corpus Christi Division for (1) conspiracy to distribute cocaine in violation of Title 21 United States Code, Section 841(a)(1), Section 846; (2) two counts of distribution and possession of cocaine in Corpus Christi, Texas, in violation of Title 21, United States Code, Section 841(a)(1); and (3) two counts of distribution and possession of cocaine in Miami, Florida in violation of Title 21, United States Code, Section 821(a)(1) Appendix "F" *infra*, (App. 14-16).

Roberto Antonio Aguilar, Laurel Ybanez and Jose Cantu, Jr. pleaded guilty to various counts of the aforementioned indictment on June 11, 1978, before United States District Judge O'Conor. (See Clerk's Docket Sheet: Date 6-11-79). The Petitioner filed pretrial motions which were denied and a jury was selected on May 15, 1979. Trial was set for June 11, 1979.

On June 11, 1979, the Court denied Petitioner's "Motion to Quash the Jury Panel" (R-41).** Thereafter, the Assistant United States Attorney called Roberto Antonio Aguilar to the witness stand. Aguilar asserted that he had intentions of pleading the Fifth Amendment and would refuse to testify (R. 44-51). The trial court then recessed for approximately one (1) hour. After the recess, the court granted Petitioner's "Motion to Quash Jury Panel" (R-53). Jury selection commenced for the

**Numbers in parenthesis prefaced by the letter "R" refer to pages of the original trial record.

second time on July 18, 1979. The trial started on July 23, 1979.

The government called Jose Cantu, Jr., one of the co-defendants, as its first witness. Defense counsel thereupon moved for a preliminary hearing ("James Hearing") to determine whether or not there was substantial independent evidence of a conspiracy, the participation of the Petitioner therein, if any, and if the hearsay declarations that the government intended to use were made in furtherance of the conspiracy. The motion for the hearing was granted (R. 130-134). At the hearing, the government called three witnesses, the aforementioned Jose Cantu, Jr., Ismael Fuentes, D.E.A.*** agent, and Albert C. Parish, also an agent of the D.E.A. Cantu testified that he introduced Roberto Aguilar to Fuentes for the purpose of selling cocaine. He stated that Aguilar told him that the cocaine was coming from Florida (R. 135-137).

Fuentes then testified that he met Aguilar who informed him that his (Aguilar's) source was Laurel Ybanez, who had a Colombian brother-in-law who resided in Miami, Florida, and shipped cocaine (R. 138-140).

The balance of agent Fuentes' testimony related to his telephonic and personal dealings with Aguilar and Ybanez. Fuentes never met Ybanez until they were both in Miami. Ybanez at times mentioned his brother-in-law, Oscar (R. 137-146). The only direct contact he had with the Petitioner was when he saw a car allegedly belonging to the Petitioner at Miami International Airport

***Drug Enforcement Agency of the United States Department of Justice.

(R. 153) and when he spoke to someone on the telephone who said his name was Oscar.

The Assistant United States Attorney then asked Fuentes about the post-arrest confession of Roberto Antonio Aguilar. Over the strenuous objection of the Petitioner, said confession was read into evidence by Fuentes as proof of the alleged conspiracy and the alleged participation of the Petitioner therein (R. 146-150). After the hearing, the Court ruled that there was substantial independent evidence of a conspiracy, that the Petitioner was a co-conspirator and that the jury would be permitted to hear all alleged co-conspirators' statements (R. 177).

The trial resumed with the jury present. Agent Fuentes was recalled to testify. His testimony was interrupted by the calling of Roberto Antonio Aguilar to testify (R. 233). A hearing was held and Aguilar stated that based upon the advice of his attorney, he would plead the Fifth Amendment and refuse to testify. Nevertheless, the Court ruled that the confession was admissible into evidence based upon the grounds that the witness was unavailable (Federal Rules of Evidence 804(a)(1)(2) 28 U.S.C.) (R. 236-254). The confession was read to the jury (R. 270-271).

Thereafter, the Petitioner was convicted of all counts in the indictment and sentenced to two consecutive fifteen (15) year terms and a fine of $15,000.00

A Notice of Appeal was filed on July 25, 1979.

In Petitioner's Brief on Appeal, in addition to attacking the use of the confession of Roberto Antonio Aguilar, the Petitioner argued that the evidence, *aliunde* the hearsay, was insufficient to support Petitioner's conviction, and the trial court improperly denied Appellant's Motion for a Directed Verdict of Acquittal (See Rule 29) *infra*, Appendix "G" (App. 17-20).

Subsequently, the United States Court of Appeals for the Fifth Circuit reversed the aforementioned conviction and remanded the case for a new trial. *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981), Appendix "H" *infra*, (App. 21-54).

The reversal was based upon the erroneous submission of the confession into evidence. The court specifically omitted addressing the sufficiency of the competent and admissible evidence although Petitioner had specifically raised this issue on appeal, Appendix "H" *infra*, (App. 54). The Court of Appeals stated:

> "Having determined that the confession at issue in this case was admitted into evidence in violation of the Federal Rules of Evidence we need not decide whether it also violated the confrontation clause of the Sixth Amendment *nor address the other points of error urged by the Defendant on this appeal.*" (Emphasis supplied)

The Petitioner then moved for a rehearing and specifically requested the Court to rule on the sufficiency of the evidence. This was denied without opinion.

On May 21, 1981, Petitioner filed a Motion in the United States District Court, Southern District of Texas, Corpus Christi Division, to dismiss the indictment on the grounds of double jeopardy. Appendix "I" *infra*, (App. 55-61).

The Motion pointed out that the Court of Appeals dealt quite extensively with the sufficiency of the evidence in its opinion, Appendix "H" *infra*, (App. 21-54), notwithstanding its assertion that it did not deal with the "other points of error urged by the defendant on appeal."

Said motion was denied. Appendix "J" *infra* (App. 62, 63). A Notice of Appeal was filed on May 26, 1981, seeking a review of the denial of the motion pursuant to *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Appendix "K" *infra*, (App. 64). Petitioner urged upon the Court of Appeals the propositions that existing case law obligates an appellate court to address the issue of evidentiary insufficiency when raised by an appellant; that the evidence was insufficient *aliunde* the confession and the hearsay based upon said confession to convict the Petitioner, and the retrial of the Petitioner would violate his rights under the double jeopardy clause of the Fifth Amendment. The Court of Appeals affirmed the District Court's denial of the Petitioner's Motion, Appendix "A" *infra*, (App. 1). The Petitioner then filed a Suggestion for Rehearing en banc in March, 1982. This was denied on April 15, 1982, Appendix "C" *infra*, (App. 9, 10).

REASONS FOR GRANTING THE WRIT

1. **Whether the double jeopardy clause of the Fifth Amendment and the existing case law of the Supreme Court of the United States obligated the Circuit Court to decide Petitioner's claim of evidentiary insufficiency notwithstanding the fact that the Circuit Court reversed the conviction of the Petitioner on the grounds of procedural trial error?**

The Petitioner herein placed four issues in front of the Circuit Court for their determination on the appeal from his conviction in the District Court in Corpus Christi, Texas. In addition to three important procedural points, the Petitioner attacked the sufficiency of the evidence (App. 17). In its opinion, the Circuit Court discussed the evidence at length; however, ultimately, the decision turned up in procedural trial error and ignored the allegations made by the Petitioner that the legally competent evidence adduced against him at trial was insufficient to sustain a conviction. *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981) Appendix "H" *infra*, (App. 21-54).

As pointed out to this Honorable Court, the Petitioner has time and time again raised the issue of evidentiary insufficiency before the District Court (App. 55-61) *infra* and the Circuit Court Appendix "G" *infra*, (App. 17-20) to no avail. The Circuit Court in its opinion affirming the denial of Petitioner's motion to dismiss the indictment on the grounds of double jeopardy, stated:

"Since *Green v. Massey*, we have reversed convictions for inadmissible evidence and remanded for new trial even when the only evidence in the record on an essential element was that excluded. Such a reversal was considered a reversal for a trial error. See e.g. *United States v. Williams*, 661 F.2d 528 (5th Cir. 1981). In *Williams* we found inadmissible the only evidence offered of value of the property involved, an essential element in that prosecution. Nonetheless we remanded for a new trial. Because we cannot know what evidence might have been offered if the evidence improperly admitted had been originally excluded by the trial judge, we have concluded that such situations do not present instances of evidentiary insufficiency. Accordingly, after reversal, the matter should be remanded for new trial." Appendix "A" *infra*, (App. 5). *United States v. Sarmiento-Perez*, ____ F.2d ____ (5th Cir. 1982).

Thus, the Petitioner is in the position of having one panel of the Circuit Court ignore his claim of insufficient evidence, Appendix "H" *infra*, (App. 21-54), and a second panel of the Circuit Court state in effect, *assuming arguendo the only evidence that could be used to sustain the conviction of the Petitioner was inadmissible, this constitutes mere trial error and the matter could be properly reversed and remanded for a new trial.* (Emphasis supplied)

This still does not address Petitioner's claim that the legally competent evidence was insufficient to support his conviction nor does it address the issue as to whether

or not the double jeopardy clause of the Fifth Amendment requires the Circuit Court to review the sufficiency of the evidence when an appellant attacks said sufficiency.

It is interesting to note that although the Circuit Court cites *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981), it ignores the language of *Goss*, at pages 1340 and 1341:

> "Because the defendants have assailed the sufficiency of the evidence to support their conviction and because the former jeopardy issue might otherwise arise in the new trial that must ensue, we address the evidence-adequacy claims made by the defendants in this appeal *despite the necessary reversal of their conviction on other grounds.* (Emphasis supplied)

In addition to the double jeopardy clause of the Fifth Amendment of the United States Constitution, federal courts have been obligated by statute to protect sound and substantial interest of those accused of crime and to dispose of appeals in the interest of justice. Title 28, Section 2106, U.S.C. states:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment decree, or order or require such other proceedings to be had as may be just under the circumstances."

Expanding on this theory, the Court stated in *United States v. Wiley*, 517 F.2d 1212, 1218, 1219 C.A.D.C. (1975):

> "In this Circuit that statutory directive has led to a number of rulings protecting the accused's interest and an acquittal when the prosecution has failed to present sufficient evidence to go to the jury. The interest is one for the trial judge to vindicate in the first instance under the command of Rule 29, Fed.R.Crim.P. But if the trial judge fails in this assignemnt, the appellate court will exercise its discretionary authority under Section 2106 to provide that protection even if the defendant may have moved in the alternative for a new trial.
>
> "The doctrine has roots in our 1963 decision in *Cefus v. United States.*[1] There we held that where as here the trial court denies a motion for a judgment of acquittal, the accused is entitled to have the sufficiency of the government's case reviewed on appeal regardless of whether he subsequently put on a defense which filled in the holes of the prosecution's case. The decision fosters one of the greatest safeguards for the individual under our system of criminal justice, 'the requirement that the prosecutor must establish a prima facie case by its own evidence before the defendant may be put to his defense.' That safeguard would be undermined if the judge's error in denying

[1] 117 U.S. App. D.C. 15, 324 F.2d 893 (1963).

> the motion for judgment of acquittal exposed the accused to a retrial at which the prosecution could supplement its case."

The rule of law which prohibits retrials following reversals for insufficient evidence has been carried forward by the Supreme Court of the United States. *Burkes v. United States*, 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141, (1978); *Green v. Massey*, 437 U.S. 19, 57 L.Ed.2d 15, 98 S.Ct. 2151, (1978). In *Burkes v. United States, supra*, this Court stated at 437 U.S. 1, 11; 57 L.Ed.2d 1, 9, 10:

> "The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is essential to the objective of the prohibition against successive trials. The clause does not allow 'the state . . . to make repeated attempts to convict an individual for an alleged offense' since 'the constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' *Green v. United States*, 355 U.S. 184, 187, 2 L.Ed.2d 199, 78 S.Ct. 221, 77 Ohio L. Ads. 202, 61 A.L.R.2d 1119 (1957); See *Serfass v. United States*, 420 U.S. 377, 387, 388, 43 L.Ed.2d 265, 95 S.Ct. 1055 (1975); *United States v. Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971)."

After stating that:

> "Given the requirement for entry of a judgment of acquittal the purpose of the clause (double jeopardy) would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple' *U.S. v. Burkes, supra*, 437 U.S. 1, 17, 57 L.Ed.2d 1, 13."

the court went on to say:

> "Moreover as *Forman*, 361 U.S. 425, 4 L.Ed.2d 12, 80 S.Ct. 481 has indicated an appellate court is authorized by Section 2106 to *'go beyond the particular relief sought in order to provide that relief which would be just under the circumstances.'* " (Emphasis supplied) *U.S. v. Burkes, supra*, 437 U.S. 1, 17, 18; 57 L.Ed.2d 1, 13, 14.

Thus, *Burkes, supra*, has firmly embedded in our jurisprudence the proposition that an accused may not be subjected to a second trial when his conviction is reversed by an appellate court for lack of sufficient evidence to sustain the jury's verdict. The result did not depend upon whether the defendant had asked for a new trial as part of his relief. This in no way disturbed prior holdings which allowed a retrial when a conviction was reversed for trial error. A recent decision of the Third Circuit Court of Appeals supports Petitioner's claims that:

> (1.) Petitioner was entitled to a review of the sufficiency of the evidence when it was raised

on the appeal in the first instance. (The Circuit Court was obligated to make such a determination).

(2.) Petitioner is entitled to and the Circuit Court is obligated to review the sufficiency of the evidence when raised by a motion to dismiss the indictment on the grounds of double jeopardy. *United States v. McQuilkin*, 673 F.2d 681 (3rd Cir. 1982).

The court in *McQuilkin, supra*, at page 685, noting that it does not agree with the Fourth, Fifth or Ninth Circuits (See footnote 7, page 685) stated:

"Although the evidence which may be reviewed when determining whether a double jeopardy claim has been demonstrated may be the same as that considered on review of conviction, that factor does not destroy appealability. Even though the evidence is reviewed for its sufficiency, it is as *Abney* emphasizes, the nature of the claim that makes the case eligible for immediate appellate review. The defendant 'is contesting the very authority of the government to hail him into court to face trial on the charge against him.' *Id.* at 659, 97 St.Ct. 2040. His position is that based upon the paucity of evidence introduced by the prosecution of the first trial, the government is barred by double jeopardy from proceeding with the impending trial. That is, if we determine as a matter of law that a fact finder could not have found the defendants in the case at bar guilty beyond a reasonable doubt, they would be entitled to a

judgment of acquittal. If, on the other hand, we were to find that there was sufficient evidence in the first trial to preclude acquittal on double jeopardy grounds, the new trial would proceed and that fact finder would then determine appellant's guilt or innocence. The government's argument on the non-collateral nature of the evidence and the similarity of the issues therefore was misdirected and must be rejected.

"As the government acknowledges in determining whether a double jeopardy claim based on the insufficiency of the evidence is appealable as a collateral order, we do not write on a clean slate in this Circuit. In *United States v. United States Gypsum Co.*, 600 F.2d 414 (3rd Cir.) cert. den. 444 U.S. 884, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979) appellants moved on remand for judgments of acquittal based on the insufficiency of the evidence of the first trial. The District Court denied the motion and we permitted an immediate appeal. We reasoned: 'because appellants' original conviction on the charges involved here was reversed on appeal, if the defendants *are correct that the evidence tendered at the first trial was insufficient to support a conviction retrial would subject them to double jeopardy. Burkes v. United States*, 437 U.S. 1, 98 S.Ct 2141, 57 L.Ed.2d 1 . . . (1978) (Emphasis supplied) Consequently, they may appeal the denial of their motion under the "collateral order" exception to the final judgment rule. See *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034,

52 L.Ed.2d 651 (1977). *Id.* at 416. The government seeks to circumvent *Gypsum* by arguing that it should be limited to cases involving its unusual procedural history. The *Gypsum* court noted that when it remanded the case it had 'reversed the appellants' convictions though without ruling on the sufficiency of the evidence.' Id. (citation omitted). The government argues that our failure to rule on the sufficiency of the evidence when the case was previously before us justified our assumption or jurisdiction in *Gypsum* and distinguishes that case from the case at bar. Our analysis of *Abney* and *Burkes* leads us to conclude that *Gypsum* should not be limited as to government desires."

The Petitioner now argues that in view of the foregoing it was the constitutional and statutory duty of the Circuit Court to rule on the sufficiency of the evidence which was among the other points raised by the Petitioner. It is fervently urged by the Petitioner that an order granting a defendant a new trial should not be used by an appellate court to avoid ruling on legal sufficiency of the evidence at the accused's first trial. The Petitioner is clearly entitled to such a ruling by the Circuit Court. The writ therefore should issue.

2. **Whether the Circuit Court erred in affirming the lower court's denial of Petitioner's pretrial motion to dismiss the indictment on double jeopardy grounds, when the legally competent evidence presented by the government against Petitioner at trial was insufficient to sustain a conviction?**

It is the contention of the Petitioner that once the Circuit Court had concluded that procedural trial error was committed and evidence was improperly admitted against the Petitioner at trial, the Circuit Court should have examined the sufficiency of the properly admitted evidence. The reasoning seems sound because improperly admitted and/or excludable evidence is no evidence at all. In fact, the problem seems to be threefold: (1) Was the properly admitted evidence sufficient to sustain a conviction; (2) was the evidence so voluminous as to preclude a review of the sufficiency of the evidence needed to convict the Petitioner; and (3) did the government have ample time to prepare and present its case? The answers to the above questions can be gleaned from the following cases of various Circuit Courts.

In *United States v. Mandell*, 591 F.2d 1347, 1373 C.A. 4 (1979), the Fourth Circuit has stated the problem which was subsequently restated by the Ninth Circuit. Does the appellate court have to examine the sufficiency of the properly admitted evidence and should it bar a retrial if the examination shows that the admissible evidence was insufficient to sustain a conviction? *United States v. Harmon*, 632 F.2d 812, 814 C.A. 9 (1980). Both Circuits agree that the Supreme Court of the United States expressly reserved the question. *Green v. Massey*,

437 U.S. 19, 26 n. 9, 98 S.Ct. 2151, 2155 n. 9, 57 L.Ed.2d 15 (1978).

In commenting on the duty of the court to review the sufficiency of the evidence and apparently relating such reviews specifically to the volume of evidence presented at trial, the court stated:

> " . . . the hard question is whether an appellate court must decide the question of the sufficiency of evidence if it has been presented in the case which would have to be reversed in all events for procedural error. We are of the opinion that ordinarily an appellate court should not be required to decide that question *although we can envision the extraordinary case which might demand it.* (Emphasis supplied) In many cases such as the case at bar, with the vast volume of evidence, it would be doing distinct disservice to decide on an appellate review that if a part of the evidence had been omitted the balance would be sufficient to convict. *United States v. Mandell, supra,* page 1373.

Now, it is urged by the Petitioner that this was not a case where there was an extraordinary volume of evidence presented by the government. The trial took only two days. Nor can it be said that the government did not have an adequate opportunity to present its case. The Petitioner urges upon this court the view that the government did just that. The government cannot argue that it was improperly denied the opportunity to present its entire case against the Petitioner.

In discussing the effect of the government having the opportunity to present a prima facie case, the Court of Appeals for the District of Columbia stated in *United States v. Wiley*, 517 F.2d 1212, 1200 n. 39 C.A.D. (1975):

> "We are cognizant that in most circuits the decision to permit a new trial generally turns on whether the government could supplement its inadequate case if allowed to retry the defendants. See, e.g., *United States v. Koonce*, 485 F.2d 374, 382 (8th Cir. 1973), where the government has put in all of its evidence or the Court of Appeals concludes that there is no realistic possibility of remedying the deficiency, the case is remanded with instructions to dismiss the indictment. See, e.g., *United States v. Snider*, 502 F.2d 646, 656 (4th Cir. 1975); *United States v. Edmons*, 432 F.2d 577 (2nd Cir. 1970); *Murray v. United States*, 403 F.2d 694 (9th Cir. 1968). In some cases a mere possibility of obtaining sufficient evidence has been found adequate to make a retrial just inappropriate. See, e.g., *United States v. Koonce*, 485 F.2d 374, (8th Cir. 1973), *United States v. Morado*, 454 F.2d 167 (5th Cir. cert. den.) 406 U.S. 917 (1972) 92 S.Ct. 1767, 32 L.Ed.2d 116; *Beltran v. United States*, 302 F.2d 48, 52 (5th Cir. 1962).
>
> "We have carefully considered the approach in these and numerous similar cases and conclude that in general it is not in the interest of justice to accord the prosecution more than one fair opportunity to present a prima facie case against the criminal defendant. To do so

would enable the prosecution to utilize evidence presented by the defense to build a prima facie case at retrial and to correct tactical mistakes in order to enhance the prospects of obtaining and sustaining a conviction. Moreover, confining the government to a single prosecution furthers sound judicial administration by creating incentives for thorough preparation and careful presentation of the government's case. These considerations coupled with the policy against multiple prosecutions, the policy underlining Rule 29 and the interest in avoiding disparate treatment of similarly situated defendants . . . outweigh the government's interest in obtaining convictions.

"Our approach is comparable to that taken in some prior circuit court opinions. See e.g. *United States v. Bass*, 409 F.2d 846, 852-53 (5th Cir. 1974) ruled District Judge may refuse to permit a retrial 'if he finds from the record that the prosecution had the opportunity to develop its case . . . at the first trial.)'; *United States v. Smith*, 437 F.2d 538, 542 (6th Cir. 1970). (Retrial hinges in our view on whether the government was unfairly prevented from producing competent evidence), *United States v. Howard*, 432 F.2d 1188-1191 (9th Cir. 1970) where the prosecution 'had the opportunity to fully develop its case or in fact did so and [i]f it did or it appears that it was responsible for its failure adequately so to do then it is not ordinarily fair that the successful appellant should be required to undergo another trial."

The prosecution should not be afforded a second opportunity to supply evidence which it failed to muster in the first proceeding. *Burkes v. United States, supra.*

The Court of Appeals in *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981) Appendix "H", *infra* (App. 21) concluded that the custodial confession of the non-testifying separately tried co-defendant should have been excluded from evidence. They also concluded that said confession was inadmissible at a non-jury "James" hearing in order to establish a prima facie case for the admission of alleged coconspirator hearsay declarations. Thus, the hearsay which was the predicate for the entire case of the government was ruled inadmissible. The Circuit Court thereby ruled on two points of error raised by the Petitioner and excluded from evidence more than ninety percent of the government's case. The language of the court commenting on the evidence justifies the latter conclusion.

Referring to the box containing the alleged cocaine, the Circuit Court said:

> "No evidence other than the (inadmissible) confession referred to below shows that Sarmiento-Perez had placed this box in the trunk of his car or had reason to know of its contents. (App. 33)
>
> "It (the Aguilar confession) was the only direct evidence identifying the defendant as the source of the illicit drugs and as a full fledged participant in the criminal enterprise. (App. 51)

"The other evidence connecting Sarmiento-Perez with the crime consisted of hearsay references . . . (App. 51)

"In addition the Aguilar confession was the only evidence adduced from a participant in a criminal enterprise that directly implicated Sarmiento-Perez. (App. 52)

"Without Aguilar's confession and the admitted coconspirator references to Sarmiento-Perez, only the observations of the D.E.A. surveillance agents and the fact that an unknown voice on the telephone identified himself as Oscar and once as Luis remained to connect this defendant with a criminal enterprise . . ." (App. 53)

The Circuit Court, without actually excluding a laboratory report from evidence, commented that "we have serious reservations about the propriety of admitting such evidence under these circumstances as a business record." (App. 54)

Thus, the Petitioner now contends that the Circuit Court in effect ruled on the sufficiency of the competent evidence adduced against the Petitioner at trial. Petitioner further states that the Court clearly found the evidence was insufficient to support a conviction on any of the counts of the indictment. Petitioner contends that in view of the language of the Court the Petitioner is entitled to an unequivocal ruling as to the sufficiency of the evidence presented against him. It is the further contention of the Petitioner that the evidence was insufficient to support a conviction on any of the counts of the indictment.

CONCLUSION

It is the view of the Petitioner that an analysis of all the authorities can lead to only one fair rule, that is when an appellant urges both "procedural trial error" and "insufficiency of evidence" (failure to grant a motion for a judgment of acquittal) the Appellate Court is obligated to decide both issues under the following circumstances:

1. The government had a full and fair opportunity to present its entire case against the defendant; and

2. The evidence was not so voluminous as to cause the Appellate Court concern as to whether or not, if some portion of the evidence was omitted, the balance would be sufficient to convict the defendant.

The evil which has been condoned by the decision below is plain. The Petitioner seeks no more than fundamental fairness in the application of the mandate of this Court in its interpretation of the Fifth Amendment as this Court itself would render. No less is expected within the federal criminal process. Because of the error as outlined above and the reasons for granting this Writ, this Petition is deserving of a review by this Court.

For each and all of the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

ARTHUR ADDESS, ESQUIRE
Counsel for Petitioner
2212 Biscayne Boulevard
Miami, Florida 33137
Phone: (305) 576-8322

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Luis Oscar SARMIENTO-PEREZ,
Defendant-Appellant.

No. 81-2207
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 19, 1982.

After remand, 633 F.2d 1092, the United States District Court for the Southern District of Texas, Owen D. Cox, J., denied defendant's motion for a dismissal on the grounds of double jeopardy, and defendant appealed. The Court of Appeals held that the double jeopardy clause did not prohibit retrial of defendant following reversal of his conviction due to trial court's error in admitting into evidence a written confession of a coconspirator which implicated defendant, even if the evidence, dehors the inadmissible evidence, was insufficient to sustain defendant's conviction.

Affirmed.

Criminal Law —193

Double jeopardy clause did not prohibit retrial of defendant after reversal of his conviction due to trial court's error in admitting into evidence a written confession of a coconspirator which implicated defendant, even if the evidence, dehors the inadmissible evidence, was insufficient to sustain defendant's conviction. U.S.C.A.Const. Amend. 5.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

Luis Oscar Sarmiento-Perez was convicted of one count of conspiring to possess cocaine with intent to distribute and two counts of distributing cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1). We reversed his conviction because of a trial error and remanded for a new trial. *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981). On remand, Sarmiento-Perez moved for a dismissal on grounds of double jeopardy. The trial court denied the motion and this appeal, one we may appropriately consider, *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), followed. We affirm.

The pertinent facts are set forth in detail in our earlier opinion reversing the conviction. We found that the trial court erred in admitting into evidence a written confession of a co-conspirator which implicated Sarmiento-

Perez. We are now admonished to interpret this opinion as effectively ruling that the evidence, dehors the inadmissible statement, was insufficient to sustain his conviction. This contention is not supported by our opinion. Any doubt in that regard is dissipated when one considers that Sarmiento-Perez raised the same issue in his application for rehearing after our earlier opinion. We rejected that application.

We are fully cognizant that under *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), the double jeopardy clause prohibits re-trial of a defendant whose conviction is reversed on a finding that insufficient evidence exists to support the conviction. However, upon reversal for a trial error, such as the introduction of inadmissible evidence, no decision has been made on the sufficiency of the evidence. Such a decision

> . . . implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect . . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Id. at 15, 98 S.Ct. at 2149. *See also United States v. Goss*, 650 F.2d 1336, 1341 n.2 (5th Cir. 1981).

We are equally cognizant that the Supreme Court rendered its decision in *Greene v. Massey*, 437 U.S. 19,

98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), contemporaneously with *Burks v. United States*. *Greene v. Massey* presented a situation somewhat analogous to the question appellant poses today. The Court reviewed an opinion of the Florida Supreme Court in which three justices in the majority appeared to reverse a conviction based on evidentiary insufficiency, while three concurring justices appeared to base their holding on trial error. The Court noted:

> When the concurrence is considered in light of the language of the *per curiam* opinion, it could reasonably be said that the concurring justices thought that the legally *competent* evidence adduced at the first trial was insufficient to prove guilt. That is, they were of the opinion that once the inadmissible hearsay evidence was discounted, there was insufficient evidence to permit the jury to convict.

Id. 437 U.S. at 26, 98 S.Ct. at 2155. The Court footnoted this observation with the comment: "We express no opinion as to the double jeopardy implications of a retrial following such a holding." *Id.* at 26 n.9, 98 S.Ct. at 2155.

> Prior to *Greene v. Massey* we addressed this question and resolved it contrary to appellant's contention. In *United States v. Houltin*, 566 F.2d 1027 (5th Cir. 1978), *cert. denied*, 439 U.S. 826, 99 S.Ct. 97, 58 L.Ed.2d 118 (1978), we rejected a claim of double jeopardy following a reversal because of the use of inadmissible evidence. We stated:

> Defendants' second contention is that the Double Jeopardy Clause of the fifth amendment prevents their retrial because the entire evidence used to convict them resulted from illegal wiretaps. Thus, according to defendants, our previous reversal of their convictions because of these wiretaps was a finding of insufficiency of the evidence and we should have remanded their case with directions to dismiss the indictment.

Id. at 1033. We rejected this contention holding that:

> . . . we grounded the reversal . . . upon a procedural defect in the trial court—the admission of evidence resulting from the illegal wiretaps . . . .
>
> It is axiomatic that the fifth amendment Double Jeopardy Clause does not prohibit the Government from retrying a defendant whose conviction has been set aside on procedural grounds.

Id. 566 F.2d at 1034.

Since *Greene v Massey*, we have reversed convictions for introduction of inadmissible evidence and remanded for new trial even when the only evidence in the record on an essential element was that excluded. Such a reversal was considered a reversal for a trial error. *See, e.g., United States v Williams*, 661 F.2d 528 (5th Cir. 1981). In *Williams*, we found inadmissible the only evidence offered of value of the property involved, an essential element in that prosecution. Nonetheless, we

remanded for retrial. Because we cannot know what evidence might have been offered if the evidence improperly admitted had been originally excluded by the trial judge, we have concluded that such situations do not present instances of evidentiary insufficiency. Accordingly, after reversal, the matters should be remanded for new trial. We are bound to determinations of prior panels of this court. Only the court sitting en banc has the prerogative to ignore or hold for naught an earlier panel decision.

The law of this circuit being well established, our decision is mandated. The earlier reversal of the conviction of Sarmiento-Perez was based on trial error and the matter was properly remanded for new trial. The double jeopardy clause does not prevent this retrial.

The decision of the district court is AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

October Term, 19

No. 81-2207
Summary Calendar
D. C. Docket No. CR-C-78-216

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LUIS OSCAR SARMIENTO-PEREZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of

the District Court appealed from in this cause be, and the same is hereby, affirmed.

February 19, 1982

ISSUED AS MANDATE:

APPENDIX C

[FILED APR 15 1982]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2207

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LUIS OSCAR SARMIENTO-PEREZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 2/19/82, 5 Cir., 198__, ____ F.2d ____).
(April 15, 1982)

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on

rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX D

TITLE 21 UNITED STATES CODE

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to

narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this

* * *

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.

APPENDIX E

TITLE 28 UNITED STATES CODE

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION
CRIMINAL NO. C-78-216

UNITED STATES OF AMERICA

vs

ROBERTO ANTONIO AGUILAR
LAURO YBANEZ
LUIS OSCAR SARMIENTO-PEREZ
JOSE CANTU, JR.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

From on or about October 1, 1978, to on or about November 3, 1978, within the Corpus Christi Division of the Southern District of Texas, and elsewhere, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., did knowingly and intentionally combine, conspire, confederate, and agree and have a tacit understanding with each other to commit an offense against the United States, to-wit: to possess with intent to distribute a Schedule II Controlled Substance, that is, cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

(Violation: Title 21, United States Code, Section 846)

COUNT II

That on or about October 19, 1978, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., did unlawfully, knowingly, and intentionally possess with intent to distribute a controlled substance under Schedule II of the Controlled Substances Act, to-wit: approximately One (1) Ounce of Cocaine.

(Violation: Title 21, United States Code, Section 841(a)(1))

COUNT III

That on or about October 19, 1978, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., unlawfully, knowingly, and intentionally did distribute a controlled substance under Schedule II of the Controlled Substances Act, to-wit: approximately One (1) Ounce of Cocaine.

(Violation: Title 21, United States Code, Section 841(a)(1))

COUNT IV

That on or about November 3, 1978, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., did

unlawfully, knowingly, and intentionally possess with intent to distribute a controlled substance under Schedule II of the Controlled Substances Act, to-wit: approximately Three (3) Pounds of Cocaine.

(Violation: Title 21, United States Code, Section 841(a)(1))

COUNT V

That on or about November 3, 1978, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., unlawfully, knowingly, and intentionally did distribute a controlled substance under Schedule II of the Controlled Substances Act, to-wit: Approximately Three (3) Pounds of Cocaine.

(Violation: Title 21, United States Code, Section 841(a)(1))

A TRUE BILL:

_____

FOREMAN OF THE GRAND JURY

J. A. "TONY" CANALES
United States Attorney
By:_____
ROBERT A. BERG, Assistant
United States Attorney

APPENDIX G

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR BY NOT GRANTING APPELLANT'S MOTIONS FOR A DIRECTED VERDICT OF ACQUITTAL IN THAT THE EVIDENCE ALIUNDE THE HEARSAY WAS INSUFFICIENT TO SUPPORT THE CONVICTION OF APPELLANT.

A perusal of the trial record reveals that the non-hearsay evidence presented against Sarmiento-Perez was almost totally non-existent. Aside from the alleged confession of Roberto Antonio Aguilar, used in the preliminary hearing and later read to the jury (R. 148-150) (R. 270-271), the direct and circumstantial evidence could be characterized, at best, as meager.

Viewing the non-hearsay evidence against Sarmiento-Perez in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed 680 (1942), this court must conclude that the Government did not carry its burden of proving beyond a reasonable doubt that the defendant (Appellant herein) knowingly participated in a conspiracy and committed the substantive acts charged in the indictment.

> "Whether the evidence is direct or circumstantial, the test is whether the jury 'could reasonably, logically, and legally infer from the evidence presented that appellant was guilty . . . beyond a reasonable doubt" *United States v. Bright*, 541 F.2d 471, 476

(5 Cir. 1976); *United States v. Smith*, 546 F.2d 1275, 1283-84 (5 Cir. 1977)" *United States v. White*, 569 F.2d 263 C.A. 5 (1978)

A review of the competent evidence offered against the defendant reveals the following: (1) Various D.E.A. agents observed the defendant pick up Aguilar and Ybanez at Miami International Airport and drive them to the defendant's house where Aguilar and Ybanez took a Buick automobile. (It was brought out at trial that Ybanez is Sarmiento's brother-in-law); (2) D.E.A. Agent Parrish saw Aguilar retrieve a box from the trunk of Sarmiento's car and leave the vicinity of the car with Ybanez. He could not observe them leave the Ramada Inn parking lot due to congestion (R. 343-344).

There was other evidence which the Government, it is certain, believes was properly offered against Sarmiento-Perez. However, the connection was flimsy and the use in front of the jury was highly prejudicial. For example: (1) Agent Fuentes testified that he spoke to someone on the telephone who identified himself as Oscar. Fuentes could not personally identify the voice (R. 154-155); (2) Agent Zapata received a "Lady Schick" box from Aguilar and Ybanez containing alleged cocaine. Zapata could not identify the "Lady Schick" box which he stated looked like thousands of other "Lady Schick" boxes (R. 306, 307). There was no testimony that the "Lady Schick" box that Zapata received was the same box alleged to have been taken out of the trunk of the defendant's car, and (3) The myriad of testimony about transactions in Corpus Christi and San Antonio, Texas with statements that the cocaine in Texas allegedly came from Florida. A proper application of the Federal Rules of Evidence Rule 801 Title 28 U.S.C.A. together with the guidelines set forth in the *United States v.*

James, 590 F.2d 275 C.A. 5 (1979) would have excluded this evidence.

Thus, the Government's case in reality rests upon the facts that Ybanez and Sarmiento are brothers-in-law; that Sarmiento was in the vicinity of an alleged crime and the use of a post arrest confession by an alleged coconspirator as prima facie evidence of the conspiracy and the defendant's participation therein.

In *United States v. Caro*, 569 F.2d 411, 418, C.A. 5 (1978) this court stated:

> "An essential element of the Government's case is proof beyond a reasonable doubt of Caro's 'agreement and knowing participation in the conspiracy.' Mere associations with other persons involved in a criminal enterprise is insufficient to prove participation in a conspiracy. *Barrera, supra*, at 1257, and cases cited therein. Proximity to the crime does not suffice to tip the balance. Even actual presence at the scene of the crime is not sufficient." Id. at 1256 and cases cited therein; see also *Gutierrez*, supra, at 1280-81."

Judge Thornberry in *United States v. White*, 569 F.2d 263 C.A. 5 (1978) stated in regard to family relationships at page 268:

> "Moreover, it is well settled that a conspiracy cannot be proven solely by family relationships or other types of close association. *United States v. Palacios, supra; United States v. Ritz*, 548 F.2d 510 (5 Cir. 1977); *United States v. Duckett*,

550 F.2d 1027 (5 Cir. 1977). Mere similarity of conduct among various persons and the fact that they have associated with or are related to each other do not establish the existence of a conspiracy."

As to the confession which was the subject of Point I and Point II of this brief, supra, it suffices to say that it was incompetent and inadmissible to prove the existence of the conspiracy and the defendant's participation therein. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *United States v. James*, 590 F.2d 575 C.A. 5 (1979); *United States v. White, supra; United States v. Caro, supra;* Federal Rules of Evidence 801(d)(2)(E) Title 28 U.S.C.A.

This court stated in *Causey v. United States*, 352 F.2d 203, 207 C.A. 5 (1965):

> "To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof and will not serve in lieu of proof . . . It is true that the proof may be circumstantial or direct or both, but it must convince beyond a reasonable doubt that a conspiracy existed, that the defendant knew it, and with that knowledge intentionally did some act or thing to further or carry on that conspiracy."

Viewing the evidence in the light most favorable to the Government, it is not felt that the Government has met this standard. *United States v. Oliva*, 497 F.2d 130 C.A. 5 (1974); *United States v. Gutierrez*, 559 F.2d 1278 C.A. 5 (1977); *United States v. Caro*, supra.

APPENDIX H

UNITED STATES of America,
Plaintiff-Appellee,

v.

Luis Oscar SARMIENTO-PEREZ,
Defendant-Appellant.

No. 79-5391.

United States Court of Appeals,
Fifth Circuit.
Unit A

Jan. 9, 1981.

Defendant was convicted in the United States District Court for the Southern District of Texas, Owen D. Cox, J., of conspiring to possess with intent to distribute, and of distributing, cocaine, and defendant appealed. The Court of Appeals, Tate, Circuit Judge, held that: (1) custodial confession by nontestifying, separately-tried codefendant, who was allowed to plead guilty to but one of five counts upon which he was indicted, was not sufficiently contrary to his penal interest for purposes of rule governing admissibility of hearsay statements, and thus such confession, insofar as it directly implicated defendant in crime charged, could not be admitted into evidence against defendant as statement against the codefendant's penal interest, and (2) admitting the confession was reversible error.

Reversed and remanded for new trial.

1. Criminal Law —417(15), 662(1)

Inculpatory statements against penal interest are admissible under rule governing hearsay exceptions and confrontation clause of Sixth Amendment only if: declarant is unavailable; statement so far tends to subject declarant to criminal liability that reasonable person in his position would not have made the statement unless he believed it to be true; and the statement is corroborated by circumstances clearly indicating its trustworthiness. Fed.Rules Evid. Rule 804(b)(3), 28 U.S.C.A.; U.S.C.A.Const. Amend. 6.

2. Criminal Law —528

Custodial confession by nontestifying, separately-tried codefendant, who was allowed to plead guilty to but one of five counts upon which he was indicted, was not sufficiently contrary to his penal interest for purposes of rule governing admissibility of hearsay statements, and thus such confession, insofar as it directly implicated defendant in crime charged, could not be admitted into evidence against defendant as statement against the codefendant's penal interest. Fed. Rules Evid. Rule 804(b)(3), 28 U.S.C.A.

3. Criminal Law —528, 1169.12

Erroneous admission, under rule governing hearsay exceptions for statements against penal interest, of custodial confession made by codefendant, who refused to testify on Fifth Amendment grounds and who was therefore unavailable as witness, was reversible error in proceedings in which the confession was the only direct evidence identifying defendant as source of illicit

drugs and as full-fledged participant in criminal enterprise. Fed.Rules Evid. Rule 804(a)(1), (b)(3), 28 U.S.C.A.; U.S.C.A.Const. Amend. 5.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

The issue before us is one of first impression: May the custodial confession of a non-testifying, separately tried coconspirator/codefendant, insofar as the confessor directly implicates an accused in the crime charged, be admitted into evidence against the accused as a statement against the confessor's penal interest under Fed.R.Ev. 804(b)(3)? We hold that it may not, and we reverse this conviction wherein the coconspirator's confession, introduced because the coconspirator refused to testify on fifth amendment grounds and was therefore unavailable as a witness, Fed.R.Ev. 804(a)(1), was key evidence that the accused knowingly and willfully participated in the conspiracy charged. Without reaching the issue of whether the admission of such evidence offends the confrontation rights of the accused under *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), we hold that the custodial confession of the coconspirator, insofar as it directly charges that the defendant participated in the criminal conduct charged, is inadmissible because it is not reliable or trustworthy evidence against the accused, *Douglas v. Alabama, supra*, for the purposes

of the against-penal-interest exception to the hearsay rule, Fed.R.Ev. 804(b)(3).

I

Before reaching the facts of the present case, we deem it advisable to set forth the constitutional and legislative context of the problem before us.

In *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), the Supreme Court reversed a conviction in circumstances similar to the present ones, because the substance of a custodial confession of a separately tried codefendant, which directly implicated the accused in the crime, was admitted into evidence in the guise of cross-examination of a hostile witness. (The codefendant had asserted his constitutional privilege to not answer any questions concerning the crime.) In doing so, the Court held that the confrontation clause of the sixth amendment prevented the admission of such evidence—the reliability of its incriminating substance could only be insured by a cross-examination of the declarant designed to illuminate the accuracy of the statements insofar as they concerned the accused then on trial.

For similar reasons, in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Court held that the accused's constitutional right to cross-examination was violated by the admission into evidence of the custodial confession of a codefendant, even though the trial court had instructed the jury that the confession had to be disregarded in the jury's determination of the accused's guilt or innocence. The issue before us concerns the reliability as evidence

against an accused of a codefendant's custodial confession implicating the accused in the crime. With regard thereto, the dissent of Mr. Justice White for the two dissenters is illuminating. The dissenters felt that the instruction to the jury—to disregard the codefendant's confession in determining the defendant's guilt or innocence—was sufficient to prevent prejudice because the jury could easily understand the obvious inherent unreliability of a custodial confession of an accomplice insofar as it implicates an accused in the commission of a crime:

> As to the defendant, the confession of the codefendant is wholly inadmissible. It is heresay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary heresay evidence. Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable.

391 U.S. 138 at 141-42, 88 S.Ct. 1629 at 1630-31 (citations omitted).

As will be elaborated later, the core holdings of these decisions were not disturbed by the plurality opinion in *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). (This decision did hold, however,

that uncrossexamined hearsay admitted into evidence by virtue of an exception to the hearsay rule did not necessarily violate an accused's confrontation rights where certain indicia of reliability were met.)

The present defendant contends that an accused's constitutional confrontation rights, as explicated by *Douglas* and *Bruton*, were not affected by the promulgation of the Federal Rules of Evidence in 1975. The Rules included a new hearsay exception, which expanded the exception permitting introduction of statements against the declarant's interest; by the expansion, the exception permitted admissibility of statements against a declarant's penal interest, not only those (as before) affecting his pecuniary and proprietary interests. The new exception is provided in Rule 804(b)(3):

> *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, *or so far tended to subject him to civil or criminal liability,* or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to *exculpate* the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. (Italics supplied.)

With regard to the issue before us, the legislative history of the adoption of this rule is of interest. See:

Rule 801, Notes of Advisory Committee, Notes of House Committee on the Judiciary, Notes of Senate Committee on the Judiciary, Notes of House Conference Committee, *West's Federal Rules, Civil Procedure—Evidence—Appellate Procedure* 218-22 (1980 ed.); 4 Weinstein's Evidence ¶804(b)(3)[03] at pp. 804-109 through -112 (1979); Comment, *Federal Rule of Evidence 804(b)(3) Inculpatory Statements Against Penal Interest*, 66 Cal.L. Rev. 1189 (1978).

By a proposed final sentence to the Rule, the original 1969 and 1971 Advisory Committee drafts explicitly barred the admission under the new hearsay exception of evidence such as that before us: "This exception does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused." This sentence was omitted, however, in the final unpublished committee draft forwarded to the Court in late 1971 and as promulgated by the Court in late 1972. In the process of legislative oversight over promulgation of the Rule, the sentence was first reinstated by the House, but then deleted by the Senate, an action in which the conference committee concurred. The stated reason for the deletion was in accordance with a basic rule-drafting approach to avoid codifying constitutional evidentiary principles because "[c]odification of constitutional principles is unnecessary and where the principle is under development often unwise." *West's Federal Rules, supra*, at 221.

However, the Advisory Committee Notes on the proposed rules, in all drafts, discussed the relationship of *Douglas* and *Bruton* to the penal-interest hearsay

exception. In the final version of the Advisory Committee notes, it states that *Douglas* and *Bruton*

> by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, *e. g.*, to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

West's, Federal Rules, supra, at 219-20

Summarizing the legislative history, Judge Weinstein concludes that "[i]n context, this means that the Rule should be interpreted to include this language [that the against-penal-interest 'exception does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused.']" Weinstein's Evidence, *supra*, at 804-110. On the other hand, a perceptive study concludes that the legislative history is at least ambiguous as to this issue. Comment, *supra*, 66 Cal.L. Rev., *supra*, at 1198.

No decision cited to or discovered by us concerns the attempted introduction of an accomplice's custodial confession under Rule 804(b)(3) (or any other principle) as evidence of the accused's guilt. The issue would not of course arise for appellate purposes unless a district court *admitted* an accomplice's custodial confession into evidence, and possibly, until now, if presented with the issue a trial court has excluded it, either on principles of a denial of confrontation rights as expressly held by *Douglas v. Alabama*, or as insufficiently trustworthy as evidence against the accused for purposes of admission under Rule 804(b)(3).

Of the cases cited to us, the closest involving the admission in a criminal trial of uncrossexamined statements of an accomplice are *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) and *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976). In these instances, where a grand jury witness was either murdered (*West*) or intimidated (*Carlson*) before trial so as to be unable to testify, his uncrossexamined grand jury testimony was admitted under the residual exception provided by Rule 804(b)(5),[1] and confrontation rights were either

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[1]Rule 804(b)(5):

(b) *Hearsay exceptions:* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) *Statement against interest.* [quoted in text.]

• • • • •

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions by having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a

held waived (by the accused's intimidation of the witness, see *Carlson*) or else not offended because of the particular substantial guarantees of trustworthiness offered by the testimony in question (see *West*). In this circuit, a conviction was reversed because of a similar attempt in the trial of an accused to use the grand jury testimony of a coconspirator, unavailable since he refused to testify. *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977). We there noted that the giving of the testimony, insofar as against the accused, was in the coconspirator's best interest; it therefore did not meet the against-penal-interest requirement of Rule 804(b)(3) that it "so far tended to subject him to . . . criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

Whatever the merits of the judicial rationales permitting admissibility under the exceptional factual situations there presented to the courts, we do not find them particularly apposite to the determination of the precise issue before us. This, as in *Douglas v. Alabama*, concerns a custodial confession, traditionally viewed as

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(Footnote 1 Continued)

material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provided the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the defendant.

of suspect reliability insofar as the declarant attempts to shift or share the blame, for whatever reason.

Ultimately, we determine that we need not reach the issue of whether the admission of the accomplice's custodial confession as evidence directly implicating the accused in the crime charged offended the latter's constitutional confrontation rights. We have concluded that, at the least, the custodial confession is (when offered against the accused) of insufficient reliability to permit its introduction under Rule 804(b)(3) under the test enunciated by this circuit in *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978).[2] Before we articulate our reasons, we set forth the factual context of the present litigation in which this issue arises.

II

The defendant Sarmiento-Perez was convicted on one count of conspiring to possess with intent to distribute, and two counts of distributing, cocaine, in violation of 21 U.S.C. §§ 846 & 841(a)(1). Although the indictment charged three other codefendants with the crimes, Sarmiento-Perez was tried separately.

The evidence shows the following facts:

In 1977, Agent Ismael Fuentes of the Justice Department's Drug Enforcement Agency (DEA) was known to Jose Cantu, Jr. (a codefendant) as "Gilbert Garza." In October of 1978, Cantu telephoned

[2]There, the admission of an oral inculpatory statement made by a dead declarant to the accused's alleged accomplice, who had pleaded guilty, was held to be reversible error.

Fuentes/"Garza" to inform him that large quantities of high quality cocaine were available, and to inquire whether Fuentes/"Garza" might be interested in making a purchase. Fuentes/"Garza" expressed his interest and a meeting was arranged. Fuentes/"Garza" met with Cantu and one Roberto Aguilar (another codefendant), whose confession is the focus of this appeal.

The testimony at trial revealed that Jose Cantu had never at any time met or conversed with *Luis Oscar* Sarmiento-Perez, the defendant—his names "Luis" and "Oscar" are, however, relevant to the identification of the present defendant as a coconspirator, for Cantu knew only that the cocaine was to come from Florida. During the course of the negotiations between Fuentes/"Garza" and Aguilar, Aguilar identified his source as one Lauro Ybanez (the brother-in-law of Sarmiento-Perez, and the third codefendant). Eventually, Fuentes/"Garza" met Ybanez and concluded the negotiations in the presence of Aguilar and Ybanez. Fuentes/"Garza" never dealt directly with Sarmiento-Perez, but both Aguilar and Ybanez made references to Ybanez's brother-in-law "*Oscar*," or "*Luis*," as the source of the South American drugs. In addition, Fuentes/"Garza" answered a telephone call from a person who identified himself as "*Oscar*" and asked to speak to Ybanez. Another DEA agent, Nick S. Zapata, spoke to a person on the telephone who identified himself as "*Luis*."

DEA surveillance agents observed the defendant Sarmiento-Perez pick up Aguilar and Ybanez at Miami International Airport and drive to Sarmiento-Perez's residence, where Aguilar and Ybanez picked up a white Buick, and departed. The following evening, agents

observed Sarmiento-Perez arrive at the Sheraton Motel, stay a few minutes, then drive to the Ramada Inn parking lot. Shortly thereafter, Aguilar and Ybanez were seen arriving at the Ramada Inn parking lot. Aguilar was observed retrieving a box from the trunk of Sarmiento-Perez's Cadillac. (No evidence—other than the confession referred to below—shows that Sarmiento-Perez had placed this box in the trunk of his car or had reason to know of its contents.) Thereafter, Aguilar and Ybanez drove from the Ramada Inn parking lot to the Sheraton Motel, where the sale was completed, and Aguilar and Ybanez were arrested. The box was later found to contain cocaine (pretermitting chain-of-custody and inadmissible-hearsay contentions).

While in custody at the DEA offices in Miami, Aguilar tendered the handwritten confession that is in dispute on this appeal. In the confession, Aguilar identified "Oscar" (the defendant Sarmiento-Perez) as the source of the cocaine and as an active participant in the sale of the cocaine to Agent Fuentes.[3]

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[3]The confession was introduced at a non-jury *James* hearing, R.II, 147-49, in order to establish a prima facie case for admission of the alleged coconspirators' out-of-court declarations, and it was also introduced at the trial before the jury as Government Exhibit 4, R.III, 271. Aguilar's confession was, of course, not admissible as a non-hearsay coconspirator statement because made after the conspiracy was terminated by the arrests and was therefore not made "by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E).

Aguilar's confession stated as follows:

> I, Roberto Aguilar arrived in Miami with Lauro Ybanez to do a coke deal with Agent Fuentes. Upon arriving, waited about 30 min. Picked up by Oscar (Lauro Ybanez brother-in-

Sarmiento-Perez vigorously challenges the admission into evidence against him of Roberto Aguilar's confession under both the Federal Rules of Evidence and the confrontation clause of the sixth amendment.

In response, the government argues that Aguilar's confession is clearly admissible under the Federal Rules

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(Footnote 3 Continued)

law) In red Cadillac. In route to unknown motel Lauro ask Oscar if everything was here (cocaine was here). Oscar said ("yes"). Arrived at motel. Receive a call—unknown caller telling me that we were being followed. About 1 hr. later spoke to Agent Fuentes on telephone. I told him that people were following me. We (Lauro & Oscar & me) decide to do deal the following day—11-2-78 in evening. We Lauro & I slept at Oscar's house. During day we drove looking to see if we were being follow. During time we were driving Oscar said that he thought that 17 more kilo's of cocaine were coming in soon. Also that someone had run away with one that he gave him to turn over to someone else. He (Oscar) said that cocaine was of good quality, that he was to sell to Agent Fuentes. We then went to bar to hear from Agent Fuentes—about 4:50 p.m. About 5:20 Agent Fuentes call us at Oscar's Bar to meet him at the Sheraton Inn lounge. About 7:00 p.m. arrived met Agent Fuentes and Agent Zapata. Lauro & I told the agents that Oscar was expecting 17 kilos of cocaine today or tomorrow morning. Then Lauro went Agent Fuentes & Zapata to their room. I waited in bar. Later Agent Fuentes return & I saw both agent & Lauro in room 511. Lauro called Oscar. Made arrangement to get cocaine. Lauro & I then drive our car (Buick) to Ramada Inn across from Sheraton where we met with Oscar, waiting in Walk to red Cadillac. He got in. Trunk was open. I pick up my coat and started walking to the Buick. Lauro pick up the box of cocaine from trunk of Oscar's car. Lauro & Oscar talk for a couple of minutes & I waited outside the Buick. Then Lauro & I drove to Sheraton Inn & Lauro & I went to room 511—Lauro carrying box of cocaine, and gave it to Agent Zapata. On this same date I saw a gun in Oscar's red Cadillac in a glove compartment.

as a declaration against Aguilar's penal interest under Rule 804(b)(3); that the same circumstances and conditions which would render the confession admissible under the Federal Rules would also prevent it from offending the sixth amendment's confrontation clause; and that, in any event, if the admission of the confession was error, the error was clearly harmless.[4]

III

Federal Rule of Evidence 804(b)(3), quoted above in Part I, provides an express exception from the operation of the hearsay rule for an extrajudicial against-interest statement by an unavailable declarant, if the statement "so far tended to subject [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

The rule further provides that such a statement is not admissible, if "offered to *exculpate* the accused . . . unless corroborating circumstances clearly indicate the trustworthiness of the statement." However, the rule does not in express terms, as finally promulgated, regulate the admission of such a statement when offered to *inculpate* the accused. Nevertheless, the rule clearly contemplates the admission, under appropriate circumstances, of such inculpatory (to a criminally accused)

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[4]Sarmiento-Perez argues in his brief and in his reply to the government's brief that the confession is inadmissible as a statement by a coconspirator under Fed.R.Ev. 801(d)(2)(E). The confession's failure to qualify as the out-of-court declaration of a coconspirator, see note 3 *supra*, does not directly preclude it from qualifying as a statement against interest within the intendment of Rule 804(b)(3).

statements against the declarant's penal interest. See Part I, *supra*. The draftsman of the rule "left to the courts the task of delineating prerequisites to the admissibility of inculpatory against-penal-interest hearsay," with "the central underpinning of such a safeguard . . . the confrontation clause of the United States Constitution." *United States v. Alvarez*, 584 F.2d 694, 700 (5th Cir. 1978).

In *Alvarez*, taking into consideration confrontation requirements, this court established the general criteria for admissibility of such statements under Rule 804(b)(3) and concluded that the corroboration requirement expressly imposed upon exculpatory statements must also be met by inculpatory statements, 584 F.2d at 701. Thus, under *Alvarez*, the general test for the admissibility of statements against penal interest is the same, whether those statements are offered to exculpate or to inculpate the accused: (1) The declarant must be unavailable; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement must be corroborated by circumstances clearly indicating its trustworthiness.

It does not follow, however, that the test is to be applied identically in all respects to inculpatory as to exculpatory statements against penal interest. To be sure, *Alvarez* could be read to that effect: The panel emphasized the value of establishing a unitary standard of admissibility under Rule 804(b)(3), *United States v. Alvarez*, 584 F.2d at 701, and indeed relied on prior decisions of this circuit dealing with exculpatory statements against penal interest in applying the test

to the inculpatory statement then before it, *id.* at 699-702 & n.9.

Nevertheless, the *Alvarez* panel did not, in terms, purport to establish the maximum limits the confrontation clause might place upon the admissibility of inculpatory statements under Rule 804(b)(3). Fairly read, *Alvarez* simply holds that the sixth amendment requires inculpatory statements against penal interest to be corroborated by circumstances clearly indicating their trustworthiness, not that sixth amendment confrontation values may not require more. Nor does *Alvarez* imply that such hearsay is necessarily tested for its reliability (i. e., as truly against the declarant's penal interest) or its trustworthiness (i. e., as clearly corroborated) when offered to *inculpate* an accused (which squarely implicates confrontation values), identically as when offered to *exculpate* an accused (where confrontation values at issue are minimal). *See, e. g.*, 4 Weinstein's Evidence ¶¶ 800[30], 800[04].

We therefore turn to the application of the *Alvarez* test to inculpatory against-penal-interest declarations in light of the special problems presented when, at the trial of innocence or guilt, the custodial confession of a declarant is offered as heresay evidence that directly implicates the criminal defendant in the commission of the offense charged.

IV

At the outset, we must take into consideration the interaction between constitutional confrontation values and a hearsay exception that permits into evidence against an accused a declarant's unsworn and

uncrossexamined statements that directly and clearly implicate the accused in the commission of the crime for which he is on trial.

As *Alvarez* expressly recognized, it is the confrontation clause of the sixth amendment that forms the criminal defendant's principal protection against the use, or misuse, or incriminating extrajudicial statements. *United States v. Alvarez*, 584 F.2d at 700. The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The right of confrontation is, of course, not absolute. In *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the Supreme Court of the United States illuminated what this and other circuits have come to see as the central feature of the confrontation guarantee, *see United States v. Alvarez*, 584 F.2d at 700-01; Comment, 66 Cal.L.Rev., *supra*, at 1197 & n.48:

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."

Dutton v. Evans, 400 U.S. at 89, 91 S.Ct. at 220, *quoting California v. Green*, 399 U.S. 149, 169, 90 S.Ct. 1930, 1936, 26 L.Ed.2d 489 (1970). Thus, in *Dutton*, the Supreme Court recognized the existence of certain "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed

before the jury though there is no confrontation of the declarant." *Dutton v. Evans*, 400 U.S. at 89, 91 S.Ct. at 220. Such indicia of reliability include adequate prior opportunity for cross-examination, *see e. g., California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), and the circumstantial guarantees of reliability that traditionally have been associated with the recognized exceptions to the hearsay rule, *Ohio v. Roberts*, ____ U.S. ____ , ____ , 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980); *see, e.g., Mattox v. United States* 146 U.S. 140, 151-52, 13 S.Ct. 50, 53-54, 36 L.Ed. 917 (1892); McCormick on Evidence §252, at 606-07 & n.10 (1972).

The Supreme Court has been at pains to point out that the contours of the hearsay rule and the confrontation clause are not wholly congruent. Conceptually, at least, evidence sufficiently reliable to qualify for admission under a recognized exception to the hearsay rule might yet offend confrontation values; and, conversely, the admission of incriminating hearsay evidence might well avoid impinging confrontation rights. *Dutton v. Evans*, 400 U.S. at 81-82, 86, 91 S.Ct. at 216,218; *California v. Green*, 399 U.S. at 155-56, 90 S.Ct. at 1933-34. *See* 4 Weinstein's Evidence ¶800[04]; McCormick on Evidence, §252.

Nevertheless, it is in practice difficult to discern the precise line of demarcation between the indicia of reliability that are sufficient to overcome confrontation problems and those that are sufficient to place an extrajudicial statement within the scope of a recognized exception to the hearsay rule. *See Ohio v. Roberts*, ____ U.S. ____ , 100 S.Ct. at 2539. *See also e. g., United States v. Alvarez, supra*, (admission of extrajudicial statement violated *both* hearsay rule and

sixth amendment confrontation clause); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) (same indicia of reliability rendered extrajudicial statement admissible under *both* hearsay rule and sixth amendment confrontation clause). *See also id.* at 1139 Widener, J., dissenting) (criticizing *West* majority for equating confrontation clause requirements with hearsay rule requirements).

This difficulty of imprecise demarcation seems inevitable. With *Dutton*, the Supreme Court grounded confrontation values upon the selfsame bedrock of "reliability" that traditionally has been the grounding rationale for virtually all the exceptions to the hearsay rule. When the extrajudicial statement of an unavailable declarant is admitted into evidence against a criminal defendant, confrontation issues are unavoidably implicated.

Evidence that seems likely to fall afoul of the confrontation clause will most often fail to qualify for admission under any recognized hearsay exception. The result is that where the confrontation clause is implicated, it will tend inevitably to place the threshold of admissibility under the applicable hearsay exception at a level that will pass constitutional muster:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." *Dutton v. Evans* 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970); *Bruton v. United States*, 391 U.S. 123, 135-137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is, indeed,

"an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E. g., Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). But its denial or significant diminution calls into question the ultimate " 'integrity of the fact-finding process' " and requires that the competing interest be closely examined. *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969).

Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973).

When inculpatory hearsay is sought to be admitted into evidence under the aegis of a recognized exception to the hearsay rule, the right to confront and cross-examine the declarant is being asked to yield to another legitimate interest in the criminal trial process: the recognition that the trier of fact should be afforded the opportunity to consider relevant hearsay that is sufficiently trustworthy. Nevertheless, the consequent denial or diminution of so essential and fundamental a confrontation value as the opportunity to cross-examine demands that the competing interest to which that value yields be "closely examined." *Ohio v. Roberts*, ____ U.S. at ____, 100 S.Ct. at 2538; *Chambers, supra*, 410 U.S. at 295, 93 S.Ct. at 1046.

Thus, a clear distinction must be drawn between statements against penal interest that are offered to exculpate a criminal defendant, as against those that are offered to inculpate him. The admission under Rule 804(b)(3) of against-interest-of-declarant hearsay statements that inculpate a criminal defendant results in the diminution of rights traditionally viewed as essential and fundamental components of an accused person's right of confrontation. Therefore, sixth amendment values demand that the threshold measure of admissibility under Rule 804(b)(3)—the *Alvarez* test—be applied in light of the "close examination" called for in *Chambers v. Mississippi*, *supra*. *Ohio v. Roberts*, ____ U.S. at ____, 100 S.Ct at 2538. *See* McCormick on Evidence §279, at n.45 (2d ed. Pocket Part 1978); Comment, 66 Cal.L. Rev., *supra*, at 1213-25.[5]

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[5]Indeed, given the very real dangers presented by the admission of inculpatory-as-to-a-third-person statements against the declarant's interest and the confrontation values that are inevitably at stake in such situations, the "close examination" called for in *Chambers* should inform not only the appellate review of the admission of such inculpatory statements, but the initial determination of their admissibility at the trial level as well. In most instances, the admissibility of such statements might well be tested by the trial court in a pretrial or non-jury hearing similar to that established by this court in *United States v. James*, 590 F.2d 575 (5th Cir. 1979) (*en banc*) for testing the admissibility of out-of-court declarations of an alleged coconspirator under Fed.R.Ev. 801(d)(2)(e). *See* Fed.R.Ev. 104(c); 4 Weinstein's Evidence 804(b)(3)[02], at 804-98, 804(b)(3)[03], at 804-104. Several considerations would suggest such a step: the *Alvarez* test is a test of *admissibility* governed by Fed. R.Ev. 104(a), and not a test of *conditional relevancy* governed by Rule 104(b), *see United States v. James*, 590 F.2d at 578-80, so it is therefore applied by the court rather than by the jury, *id.* at 579-80; inculpatory statements against penal interest present the same great danger of jury prejudice that is raised by coconspirator statements, *see id.* at 579, and therefore deserve the same meticulous

V

[1] Following *United States v. Alvarez, supra*, inculpatory statements against penal interest are admissible under Rule 804(b)(3) and the confrontation clause of the sixth amendment only if they meet a three-part test:

(1) The declarant must be unavailable;

(2) The statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and

(3) The statement must be corroborated by circumstances clearly indicating its trustworthiness.

For present purposes, we assume that the hearsay evidence meets the criteria of (1) and (3). We now discuss, in terms of the close examination required, general considerations relevant to the determination of whether criterion (2) of the *Alvarez* test is met—that the statement, insofar as implicating the criminal defendant, is sufficiently against the penal interest of the declarant to warrant its admission under the Rule as reliable.

The government should, of course, be required to show that the statement clearly and directly implicates

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(Footnote 5 Continued)

treatment at the trial level; the potential appetite of the hearsay exception here at issue is such that it threatens to consume the coconspirator exception of Rule 801(d)(2)(E), *see United States v. Alvarez, supra*, at 701.

the declarant himself in criminal conduct. Comment, 66 Cal.L.Rev., *supra*, at 1214. *Cf.*, *United States v. Pena*, 527 F.2d 1356, 1361-62 (5th Cir. 1976) (exculpatory statement insufficiently against penal interest where "there are possible explanations . . . inconsistent with culpability").

In this regard, the "expansive" interpretation of the against-interest requirement adopted by this court in such cases as *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978) ("[B]y referring to statements that 'tend' to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant.") may be well suited to test the admissibility of an *exculpatory* statement against the declarant's penal interest, such as was involved in *Thomas*. There, in the absence of conflict with confrontation values, the circumstance that the out-of-court statement would have probative value in a trial against the declarant himself is indicative that it is sufficiently against his penal interest as to be reliable.

However, the *Thomas* test is not appropriate when such hearsay is offered to *inculpate* a criminal defendant on trial. The same hearsay statement, when offered as evidence of the guilt of a criminal defendant, does not as against him necessarily possess the same reliability when subjected to the close examination that is required (see Part IV *supra*) where confrontation rights might otherwise be infringed. Given the advantages readily to be perceived in the incrimination of another for a crime in which the declarant himself is implicated, the circumstance that the inculpatory-against-the-accused statement would have probative value against the

declarant does not necessarily indicate that, insofar as it implicates the *accused*, it is sufficiently against the declarant's interest so as to be reliable. See Part I *supra; cf., United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977).

For a more specific discussion of the close examination requisite to ascertain that the statement was actually against interest within the intendment of the Rule, insofar as the hearsay statement is offered to inculpate a criminal defendant, see 4 Weinstein's Evidence ¶804(b)(3)[02], at 807-97 through -101; and Comment, 66 Cal.L.Rev., *supra*, at 1214-15.

VI

We turn now to the task of applying this test to the confession that is the focus of this appeal, mindful of the need for close examination of all pertinent circumstances.

[2] With regard to the second criteria of the *Alvarez* test, we conclude that Aguilar's confession was not sufficiently contrary to his penal interest for the purposes of Rule 804(b)(3).

Aguilar's statement is an explicit confession of criminal activity on his part; it thus clearly and directly implicates him in a crime and is, in this regard, against his penal interest. But our inquiry into the admissibility of his statement cannot end there. A close examination of all the circumstances surrounding the making of the statement is required in order to determine whether it so contravenes the declarant's penal interest that a reasonable person in his position would not have made

the statement accusing a third person unless he believed it to be true. Such examination reveals circumstances that significantly undermine this traditional surety of the statement's reliability. This was not a spontaneous declaration made to friends and confederates, but a custodial confession, given under potentially coercive circumstances that could not at trial—and cannot now—be adequately examined. *See United States v. West*, 574 F.2d 1131, 1137 (4th Cir. 1978). There were, in addition, obvious motives for falsification—the very natural desire to curry favor from the arresting officers, the desire to alleviate culpability by implicating others, the enmity often generated in a conspiracy gone awry, the desire for revenge, all might lead an arrestee-declarant to misrepresent or to exaggerate the role of others in the criminal enterprise. Finally, it appears from the record that the declarant was allowed to plead guilty to but one of the five counts upon which he was indicted. *See* R.II: 3650, 111, 233. From these circumstances, which are not counterbalanced by circumstances indicating the reliability of the statement, it is reasonable to suppose that this declarant, and indeed a reasonable person in his position, might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement as a whole—including the ostensibly disserving portions—to be *in* his interest rather than against it.

For these reasons, then, we must conclude that the confession here at issue lacks the traditional surety of reliability or trustworthiness upon which this hearsay exception is grounded, and is therefore inadmissible in evidence against the defendant, Sarmiento-Perez.

VII

The unreliability of the confession in this case is predicated upon circumstances that inhere in the making of virtually every custodial confession. It is for this reason that such statements have traditionally been viewed with "special suspicion." *Bruton v. United States*, 391 U.S. 123, 141, 88 S.Ct. 1620, 1631, 20 L.Ed.2d 476 (1968) (White, J., dissenting). *See* Advisory Committee Notes to Fed.R.Ev. 804(b)(3); 4 Weinstein's Evidence ¶804(b)(3)[03], at 804-109, -110, -111 & n.32.

For those same reasons, third-party *custodial* confessions, when offered to inculpate a criminal defendant, lack those "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970), are thus inherently untrustworthy in the eyes of the sixth amendment, *see Ohio v. Roberts*, ____ U.S. at ____, 100 S.Ct. at 2539, and cannot for that reason lie within the intended scope of the hearsay exception for statements against penal interest. *See Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

In *Douglas v. Alabama*, *supra*, the custodial confession of a separately tried codefendant, who refused (as here) to testify on fifth amendment grounds, was read to the jury. In reviewing *Douglas'* conviction, the Supreme Court held that the indirect admission of the out-of-court declarant's inculpatory statement had violated Douglas' right of confrontation. *Douglas v. Alabama*, 380 U.S. at 419-20, 85 S.Ct. 1074, 1077.

Douglas focused on the right of cross-examination as the central feature of the protection afforded by the confrontation clause:

> Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. As the Court said in *Mattox v. United States*,
>
> > "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409.
>
> In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause.

Douglas v. Alabama, 380 U.S. at 418-19, 85 S.Ct. at 1076-77.

In *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the Supreme Court held that the right of confrontation was not violated by the admission of a coconspirator's inculpatory out-of-court declaration that was admissible under the *state's* liberal hearsay exception, but inadmissible under the narrower federal hearsay exception. The *Dutton* court focused upon the now-familiar "indicia of reliability" standard as the threshold of admissibility under the confrontation clause, and distinguished *Douglas* as follows:

> This case does not involve evidence in any sense "crucial" or "devastating," as did all the cases just discussed. It does not involve the use, or misuse, of a confession made in the coercive atmosphere of an official interrogation, as did *Douglas*. . . . It does not involve any suggestion of prosecutorial misconduct or even negligence, as did . . . *Douglas*. . . .

Dutton v. Evans, 40 U.S. at 86-87, 91 S.Ct. at 218-19.[6]

---

[6]Much has been made of the "crucial" and "devastating" language in *Dutton* and *Douglas*. The thrust of the language in these decisions may be read as intending nothing more than the observation that the evidence at issue was—or was not—sufficiently damaging to the defense to be considered grounds for reversal:

> This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against the petitioner. The circumstances are therefore such that "inferences from a witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant."

Douglas v. Alabama, 380 U.S. at 420, 85 S.Ct. at 1077 (citations omitted).

Dutton does not purport to overrule or modify the holding *Douglas v. Alabama*. To the contrary, in distinguishing *Douglas* as it did, it serves to emphasize what we now read as a key to the subsequent applicability of the *Douglas* holding: that *Douglas* dealt with "a confession made in the coercive atmosphere of official interrogation." Implicit in the distinguishing language quoted from *Dutton*, above, is the suggestion that such confessions do not fit within the class of statements *Dutton* would admit. *See United States v. West*, 574 F.2d at 1137.

Thus, we find support in *Dutton* and *Douglas* for our conclusion, here reiterated, that the custodial confession of an unavailable declarant lacks those indicia of reliability that would render it admissible in evidence against a criminal defendant within the hearsay exception provided by Rule of Evidence 804(b)(3). We do not therefore reach the related issue of whether its admission would likewise fall afoul of the confrontation clause of the Constitution.

VIII

[3] for the reasons delineated above, we conclude that the trial court's admission of the custodial confession of Roberto Aguilar was error. The government contends that it was harmless; we disagree.

We need not conclude that it was error of constitutional proportion in order to find it to be reversible. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1976). The confession here at issue added "*critical* weight," *Douglas v. Alabama*, 380 U.S. at 420, 85 S.Ct. at 1077, to the prosecution's

case, and thus constituted reversible error as affecting the substantial rights of the accused even under the less rigorous standard provided for errors of less than constitutional magnitude. *See* Fed.R.Civ. P. 61.

The Aguilar confession added critical weight to the prosecution's case against Sarmiento-Perez in two important ways. Its impact on the jury was, in all probability, quite substantial. It was the only direct evidence identifying the defendant as the source of the illicit drugs, and as a full-fledged participant in the criminal enterprise.

The other evidence connecting Sarmiento-Perez with the crime consisted of hearsay references to "Luis," "Oscar," and "Ybanez's brother-in-law," as testified to by the DEA undercover agents, and the observation of Sarmiento-Perez picking up the principal admitted conspirators, his brother-in-law Ybanez and Aguilar, at the airport, his presence at the Ramada Inn parking lot when the cocaine was apparently obtained by Aguilar and Ybanez, and the retrieval by Aguilar of a white box from the trunk of Sarmiento-Perez's car at that time, as testified to by the DEA surveillance agents. This evidence, by itself, does not, beyond innocent explanation, prove a knowing participation in the criminal offense, or a knowing agreement (the essence of a conspiracy) to join others in a concerted effort to bring about a common end, *United States v. Perez*, 489 F.2d 51, 61 (5th Cir. 1973), cert. denied, 1974, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664).[7] That is, although the

[7]To be convicted of an unlawful conspiracy, the government must prove beyond a reasonable doubt that Sarmiento-Perez had knowledge of the conspiracy and intended to join or associate himself with it. *United States v. Solis*, 612 F.2d 930 (5th Cir. 1980).

circumstantial evidence may be indicative that the accused was a knowing member of the cocaine-distribution scheme, we cannot say that, without the admission of the confession, the jury would not have found the accused was an unwitting accomplice of his brother-in-law rather than a knowing and willing participant in his drug-distribution efforts. In addition, the Aguilar confession was the only evidence adduced from a *participant* in the criminal enterprise that directly implicated Sarmiento-Perez.

For these reasons, we conclude that it is highly probable that the confession carried critical weight in the minds of the jurors, and thus contributed significantly to their verdict.

Further, the confession was a crucial link in the chain of evidence used by the prosecution to establish the predicate for the admission of the admitted coconspirators' references to Ybanez's supplier as "Luis", "Oscar", or "Ybanez's brother-in-law". As this court noted in *United States v. Grassi*, 616 F.2d 1295, 1300-01 (5th Cir. 1980):

> Evidence submitted at a *James* hearing for the purpose of proving a conspiracy must, of course, be free from hearsay objection; otherwise, a coconspirator's hearsay might bootstrap itself into admissible evidence . . . [I]f a coconspirator's extrajudicial declaration is admitted into evidence, the judge must reconsider its admissibility as the conclusion of the trial. His second decision . . . is to be made by a higher standard: whether the prosecution, through independent evidence, has

> demonstrated the defendant's participation in a conspiracy by a preponderance of the evidence. If the prosecution has not prevailed on this point, the judge must decide whether a cautionary instruction will cleanse the record of prejudice or whether a mistrial is required.

The independent evidence to which the trial judge must turn at the conclusion of the trial must, of course, be admissible, and cannot include the extrajudicial coconspirator declarations whose admissibility is at issue. *E. g., United States v. Alvarez*, 584 F.2d at 696.

Without Aguilar's confession and the admitted coconspirators' references to Sarmiento-Perez, only the observations of the DEA surveillance agents and the fact that an unknown voice on the telephone identified itself once as "Oscar" and once as "Luis" remain to connect this defendant to the criminal enterprise. This circumstantial evidence may or may not have been sufficient to submit the cocaine distribution charge to the jury, but it is even more doubtful that by itself the DEA agent's observations established the required prima-facie-conspiracy predicate for the admission of the coconspirator declarations that were in fact presented to the jury. Thus, the impact of this confession upon the jury's verdict is magnified by the fact that it carried with it additional evidence that in the absence of the confession would have been excluded.

For these reasons, we cannot conclude that the admission of Roberto Aguilar's confession was harmless.

IX

Having determined that the confession at issue in this case was admitted into evidence in violation of the Federal Rules of Evidence,[8] we need not decide whether it also violated the confrontation clause of the sixth amendment, nor address the other points of error[9] urged by the defendant on this appeal.

The conviction of Luis Oscar Sarmiento-Perez is, as to all counts, REVERSED AND REMANDED for a new trial.

---

[8]The government also urges the admissibility of this confession under the residual hearsay exception provided by Fed.R.Ev. 804(b)(5), *see* note 1, *supra*. We find no merit to this contention. Lacking the indicia of reliability required by the confrontation clause and the traditional surety of trustworthiness embodied in Rule 804(b)(3), this confession necessarily lacks the "equivalent guarantees of trustworthiness" required by the residual exception. *See United States v. Alvarez*, 584 F.2d at 702 n.10.

[9]Among the points of error raised on this appeal is the contention that the trial court erred in admitting the laboratory analysis report identifying the "white powder" as cocaine.

The chemist who conducted the analysis that was the subject of that report was not present at the trial. Nevertheless, the report was admitted as a business record, and a supervisory chemist from the testing laboratory was allowed to testify that the substance was cocaine, even though he had neither participated in, nor observed, the actual analysis.

While our resolution of this case makes it unnecessary for us to decide whether the trial court's ruling in this regard violated the defendant's confrontation rights, we do note that we have serious reservations about the propriety of admitting such evidence under these circumstances as business records under Fed.R.Ev. 803(6), (8), and (24). *See United States v. Oates*, 560 F.2d 45 (2d Cir. 1977).

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION
CRIMINAL NO.: C-78-216

UNITED STATES OF AMERICA,

v.

LUIS OSCAR SARMIENTO-PEREZ,
Defendant.

AMENDED MOTION TO DISMISS INDICTMENT

COMES NOW, LUIS OSCAR SARMIENTO-PEREZ and by and through his undersigned attorney moves this Honorable Court to dismiss the above-encaptioned Indictment or, in the alternative, to bar the prosecution of said Indictment on the grounds that to try the Defendant on said Indictment would violate the double jeopardy clause of the Fifth Amendment of the United States Constitution.

The Defendant, SARMIENTO-PEREZ, was tried and convicted on one Count of Conspiracy to Possess with Intent to Distribute and two Counts of Distributing Cocaine in violation of 21 U.S.C. §846 and 841(a)(1).

Subsequently, the United States Court of Appeals for the Fifth Circuit reversed the aforementioned conviction. *United States v. Sarmiento-Perez* — Fed.2d — January 9, 1981.

In reversing the conviction, the Court of Appeals made various comments as to the sufficiency of the evidence against SARMIENTO-PEREZ without the inadmissible confession of Roberto Aguillar. It is quite apparent that the admissible and competent evidence introduced against SARMIENTO-PEREZ at the trial was insufficient to support a conviction that the direct and circumstantial evidence presented against the Defendant was at best meager. During the course of the opinion, this crucial point (sufficiency of evidence) was dealt with quite thoroughly.

After summarizing the evidence (O2466-2467)* and specifically referring to the box containing the alleged cocaine, it is stated by the Court:

> "No evidence other than the confession referred to below shows that Sarmiento-Perez had placed this box in the trunk of his car or had reason to know of its contents." O2467.

In fact, the Court alluded to the distinct possibility that the Government could not show that the box taken out of the Defendant's car was the same box given to the D.E.A. agents in the Sheraton motel, nor could the Government show that the box received in evidence at trial was the same box that the D.E.A. agents received in the Sheraton motel.

> "The box was later found to contain cocaine (pretermitting chain of custody and inadmissible hearsay contentions)" O2467.

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*Numbers preceded by the letter "O" refer to pages in the original Opinion.

Thereafter, the Court, again summarizing and commenting on the evidence, stated the following:

> ". . . It [the Aguillar Confession] was the only direct evidence identifying the defendant as the source of the illicit drugs, and as a full fledged participant in the criminal enterprise" O2476.

Addressing itself to the evidence other than the confession allegedly connecting Sarmiento-Perez with the crime, the Court stated:

> "This evidence, by itself, does not beyond innocent explanation, prove a knowing participation in the criminal offense, or a knowing agreement (the essence of conspiracy) to join others in a concerted effort to bring about a common end . . . That is although the circumstantial evidence may be indicative that the accused was a knowing member of the cocaine distribution scheme, we cannot say without the admission of the confession the jury would not have found the accused was an unwitting accomplice of his brother-in-law rather than a knowing and willing participant in his drug distribution efforts. In addition, the Aguillar confession was the only evidence adduced from a participant in the criminal enterprise that directly implicated Sarmiento-Perez." O2476.

Lastly, the Court, after referring to the improper use of the confession to establish a predicate for the admitted coconspirator statements concluded:

"Without Aguillar's confession and the admitted coconspirator's references to Sarmiento-Perez only the observations of the D.E.A. surveillance agents and the fact that an unknown voice on the telephone identified itself once as 'Oscar' and once as 'Luis' remain to connect the defendant to the criminal enterprise. This circumstantial evidence may or may not have been sufficient to submit the cocaine distribution charge to the jury, but it is even more doubtful that by itself the D.E.A. agents' observations established the prima facie conspiracy predicate for the admission of the conconspirator declarations that were in fact presented to the jury." O2477.

Viewing the competent direct and circumstantial evidence presented against Sarmiento-Perez, as summarized by the Court of Appeals, in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) the inescapable conclusion is that the Government did not carry its burden of proving, beyond a reasonable doubt, that the Defendant was guilty of the acts charged in the Indictment.

The Court of Appeals has recently stated:

"The test for judging sufficiency is the same for direct or circumstantial evidence and the test is 'whether reasonable minds could have found the evidence inconsistent with every reasonable hypothesis of the defendant's innocence.' *U.S. v. Sloane*, 601 F.2d 800 (5th

Cir. 1979)." *U.S. v. Allison*, 616 F.2d 779, 784 (5th Cir. 1980).

This Circuit has consistently followed the above stated rules as to the sufficiency of evidence necessary to convict one of a crime. See *U.S. v. Alfrey*, 620 F.2d 551, (C.A. 5, 1980); *U.S. v. Barresi*, 601 F.2d 193 (C.A. 5, 1979); *U.S. v. Sink*, 586 F.2d 1041, Cert. den. 99 S.Ct. 3102, 443 U.S. 912, 61 L.Ed.2d 876 (1978); *U.S. v. Hines*, 563 F.2d 737, (C.A. 5, 1977); *U.S. v. Barrera*, 547 F.2d 125 (C.A. 5, 1977).

The clear interpretation of the competent evidence summarized by the Court, as pointed out above, is that the facts and circumstances were as consistent with innocence as they were with guilt.

It has been held that neither mere association, *U.S. v. Caro*, 569 F.2d 411, 418 (C.A. 5, 1978); or proximity to and/or actual presence at the scene of a crime, *U.S. v. Guttierez*, 559 F.2d 1278, 1280, (C.A. 5, 1977); *U.S. v. Barrera*, 547 F.2d 1250, (C.A. 5, 1977); or family relationships, close association or similarity of conduct, *United States v. White*, 569 F.2d 263, 268 C.A. 5 (1978), *United States v. Palacios*, 556 F.2d 1359 (C.A. 5, 1977); *United States v. Ritz*, 548 F.2d 510 (C.A. 5, 1977), *United States v. Duckett*, 550 F.2d 1027, (C.A. 5, 1977) are sufficient in themselves to prove knowing participation in a criminal conspiracy.

The sufficiency of evidence test followed by the Court of Appeals as stated in *U.S. v. Allison*, *supra*, is well settled in our jurisprudence. Almost a century ago it was said:

"In determining a question of fact from circumstantial evidence, there are two general rules to be observed: 1. The hypothesis of delinquency or guilt should flow naturally from the facts proved and be consistent with them all. 2. The evidence must be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him, or in other words the facts proved must be consistent with and point to this guilt not only, but they must be inconsistent with his innocence." *People u. Bennet*, 49 N.Y. 137, 144, 145 Ct. of Appeals, N.Y. (1892); *People u. Fitzgerald*, 156 N.Y. 253, 258, 50 N.E. 846, 847, Ct. of Appeals N.Y. (1898).

In view of the foregoing, it is quite obvious that the competent evidence adduced at the trial was insufficient to support a conviction. It is also obvious that while the Court of Appeals made no specific finding of insufficiency of evidence, its opinion was replete with references to the meagerness of the competent evidence and the failure of said evidence to prove the Defendant's guilt beyond a reasonable doubt.

The Supreme Court of the United States has stated that where there was an insufficiency of evidence, the only just remedy available would be a directed judgment of acquittal. *Burks u. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1. Thus, the Supreme Court has done away with the idea that the prosecution, having failed to make a sufficient case against an accused, should be given a second opportunity. This would be fundamentally inconsistent with the double jeopardy clause. *Burks u.*

United States, supra, Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 215.

WHEREFORE, it is respectfully urged that this Court dismiss the Indictment and/or bar a second trial on the grounds that said second trial would violate the Defendant's rights under the double jeopardy clause of the Fifth Amendment of the United States Constitution and for such other, further and different relief as to the Court may seem just and proper.

Respectfully submitted,

/s/
ARTHUR ADDESS
Attorney for the Defendant
Office & Post Office Address
2212 Biscayne Boulevard
Miami, Florida 33137
Tel. (305) 576-8322

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Defendant's Amended Motion to Dismiss Indictment was mailed this 19th day of May, 1981 to ROBERT BERG, ESQ., Assistant United States Attorney, Southern District of Texas, Corpus Christi Division, United States Courthouse, Corpus Christi, Texas.

/s/_____
ARTHUR ADDESS

APPENDIX J

[FILED MAY 26 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

CRIMINAL NO.: C-78-216

UNITED STATES OF AMERICA,

v.

LUIS OSCAR SARMIENTO-PEREZ,

Defendant.

ORDER

The Defendant, LUIS OSCAR SARMIENTO-PEREZ, having moved this Court to dismiss Indictment No. C-78-216 or, in the alternative, bar the trial of said Indictment on the grounds that the trial would violate the Defendant's rights under the double jeopardy clause of the Fifth Amendment of the United States Constitution; and the Court having heard the arguments of ARTHUR ADDESS, ESQ., counsel for the Defendant, in support of said Motion, and the argument of the Assistant United States Attorney opposed to said Motion, and the Court being otherwise fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED, that the Defendant's Motion is hereby denied in all respects.

DATED: May 26, 1981.

/s/ Owen D Cox
Judge, United States
District Court
Southern District of Texas
Corpus Christi Division

Copies furnished to:

Arthur Addess, Esq.

Robert Berg, Esq.
Assistant U. S. Attorney

APPENDIX K

[FILED MAY 26 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

CRIMINAL NO. c-78-216

UNITED STATES OF AMERICA,

v

LUIS OSCAR SARMIENTO-PEREZ,

Defendant.

NOTICE OF APPEAL

LUIS OSCAR SARMIENTO-PEREZ, Defendant in the above styled and numbered proceeding, by and through his undersigned counsel, hereby files this Notice of Appeal to the United States Court of Appeals for the Fifth Circuit from that certain order of the United States District Court for the Southern District of Texas, Corpus Christi Division, denying his Motion to Dismiss/Bar Prosecution based upon the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution entered on the 26th day of May, 1981. This appeal is taken pursuant to the dictates of *Abney v. United States*, 431 U.S. 651 (1977).

All parties to the above-styled and numbered proceedings and the Honorable Owen D. Cox, United States District Judge, Presiding Judge in the above-styled and numbered proceedings, are called upon to take notice of this filing and its procedural ramifications.

Respectfully submitted,

/s/_____

ARTHUR ADDESS
Attorney for the Defendant
Office & Post Office Address
2212 Biscayne Boulevard
Miami, Florida 33137
Tel. No. (305) 576-8322

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 11 day of June, 1982 to: Solicitor General of the United States, Department of Justice Building, Washington, D.C. 20530.

ARTHUR ADDESS, Esquire
Counsel for Petitioner
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Miami, Florida 33137
Phone: 305-576-8322

ARTHUR ADDESS

Office - Supreme Court, U.S.
FILED
AUG 26 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2286

In the Supreme Court of the United States

OCTOBER TERM, 1982

LUIS OSCAR SARMIENTO-PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
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QUESTION PRESENTED

Whether the court of appeals was correct when, after finding reversible error in the admission of certain evidence at petitioner's trial, it refused to pass on petitioner's claim that the remaining evidence was insufficient to support his conviction and rejected his claim that retrial would be barred by double jeopardy principles if the remaining evidence was insufficient.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2286

LUIS OSCAR SARMIENTO-PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. App. 1-8, 21-54) are reported at 667 F. 2d 1239 and 633 F. 2d 1092.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1982. A petition for rehearing was denied on April 15, 1982. The petition for a writ of certiorari was filed on June 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of two counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to three concurrent terms of

15 years' imprisonment and to special parole terms totalling ten years. He was also fined $15,000. The court of appeals reversed petitioner's convictions and remanded for a new trial (Pet. App. 54), holding that the district court had erred in admitting into evidence a confession that incriminated petitioner, made by Robert Aguilar, a co-defendant who had pleaded guilty and refused to testify at petitioner's trial on Fifth Amendment grounds (see Pet. 3-5). Aguilar's confession had been admitted under Fed. R. Evid. 804(b)(3) as a statement against penal interest by an unavailable declarant. Without reaching the question whether the Confrontation Clause had been violated, the court of appeals concluded (Pet. App. 31) that the confession lacked sufficient indicia of reliability to warrant its admission under an exception to the hearsay rule.

The court of appeals did not address petitioner's claim that the remaining evidence was insufficient to support his conviction.[1] However, in rejecting the government's harmless error argument, the court remarked that the remaining evidence "may or may not have been sufficient to submit the cocaine distribution charge to the jury" (*id.* at 53). Petitioner filed a petition for rehearing asking that the court of appeals rule on the sufficiency issue, but rehearing was denied without comment.

After remand, petitioner moved the district court for dismissal of the indictment on double jeopardy grounds. He contended that the inadmissible confession was the most crucial evidence adduced against him at the first trial, that

---

[1] Petitioner's brief made it clear that he did not contest the sufficiency of the evidence when the confession was included. Point IV of the brief, which argued that the evidence was insufficient (see Pet. App. 17-20), stated: "As to the confession which was the subject of Point I and Point II of this brief, *supra*, it suffices to say that it was incompetent and inadmissible to prove the existence of the conspiracy and the defendant's participation therein."

the remaining evidence was insufficient to support his convictions, and that therefore the Double Jeopardy Clause barred reprosecution. The district court denied that motion, and the court of appeals affirmed (Pet. App. 1-6). The court of appeals rejected the claim that its previous decision had in effect found the evidence to be insufficient without the inadmissible confession (*id.* at 2-3). The court then held (*id.* at 3-6) that when a conviction is reversed for error in the admission of evidence, the sufficiency of the evidence need not be examined because retrial would be permitted even if the remaining evidence was insufficient. This was so, the court stated (*id.* at 6), because "we cannot know what evidence might have been offered if the evidence improperly admitted had been originally excluded by the trial judge."

2. The evidence at trial, excluding the confession ruled inadmissible on appeal, showed that in October 1978 DEA Agent Ismael Fuentes posed as a major drug dealer in the area of Corpus Christi, Texas (Tr. 186, 208). Robert Aguilar told Fuentes that he could furnish up to five kilograms of cocaine on a weekly or bi-weekly basis, but that the first sale would be limited to a single ounce (Tr. 195, 200). Aguilar also told Fuentes that he obtained his cocaine from Lauro Ybanez and that Ybanez' source of supply was his brother-in-law, who resided in Miami, Florida (Tr. 195, 202). Because Fuentes refused to purchase just one ounce, Aguilar placed him in telephone contact with Ybanez, who confirmed that his source came from Miami (Tr. 203-205).

On October 30, Aguilar and Fuentes met in San Antonio. Aguilar again placed a telephone call to Ybanez and permitted Fuentes to speak with Ybanez about purchasing two kilograms of cocaine (Tr. 213-217). Fuentes and Ybanez agreed that the transaction would take place in Miami. Ybanez said that his brother-in-law, whom he called Oscar (petitioner's middle name), was the source of the cocaine (Tr. 218). Later that night, Ybanez told Fuentes that he had

spoken with his brother-in-law and that everything was ready (Tr. 219). Aguilar provided Fuentes with a telephone number in Miami where he and Ybanez could be reached (Tr. 220).

Aguilar and Ybanez flew to Miami on November 1. DEA agents observed petitioner meet Aguilar and Ybanez at the airport in a Cadillac and transport them to three locations, the last of which was petitioner's residence. Ybanez and Aguilar remained at the residence for about 15 minutes and then drove off in a Buick, which was also owned by petitioner (Tr. 339-342, 349-350, 359).

Fuentes also arrived in Miami on November 1 and checked into the Sheraton Inn River House Hotel near the airport. After ascertaining that the number provided by Aguilar was for a telephone located at Oscar's Restaurant and Lounge (petitioner's place of business), Fuentes called the number and spoke with Aguilar, who said that he, Ybanez, and the latter's brother-in-law were at the restaurant. Aguilar expressed concern that he and Ybanez had been followed by law enforcement officers after leaving the airport and suggested that the transaction be put off until the next day (Tr. 220-225, 350).

At 6:45 p.m. on November 2, Aguilar and Ybanez met Fuentes and undercover agent Nick Zapata in the lobby of the Sheraton Inn River House Hotel. While Aguilar remained in the lobby, Ybanez proceeded with the agents to their motel room in order to inspect the purchase money. While in the room, Ybanez told the agents that Oscar, his brother-in-law, was awaiting the imminent arrival of a shipment of 17 kilograms of cocaine (Tr. 228, 256, 258).

After examining the agents' money, Ybanez made a telephone call to an individual whom he called both Luis and Oscar (Tr. 260). Ybanez then told the agents that "Mr. Sarmiento" wanted the transaction to occur elsewhere (Tr.

259). When the agents refused, Ybanez made another telephone call and told the agents that the party on the telephone line wanted to speak with one of them (Tr. 298). Zapata took the telephone and spoke with someone who called himself Luis (petitioner's first name) (*ibid.*). After reiterating that he and Fuentes would not proceed to another location, Zapata returned the telephone to Ybanez. At the end of his telephone conversation, Ybanez told the agents, "He will be here about 9:00 o'clock with the cocaine" (Tr. 300).

At approximately 9:30 p.m. petitioner arrived at the Sheraton Inn River House Hotel. He drove his Cadillac around the front of the motel for several minutes and then proceeded to the parking lot of a Ramada Inn located one-half block away (Tr. 343, 352, 361). At this time Ybanez, who was still in Fuentes' motel room, received a telephone call. After the call, Ybanez said that the "stuff" had arrived (Tr. 301-302). Ybanez remarked, "He is here. He's across the street. I will be back later" (Tr. 260). Ybanez and Aguilar left the room and drove the Buick to the Ramada Inn parking lot, where they met petitioner. Aguilar removed a box from the open trunk of petitioner's car and then closed the trunk. He and Ybanez then returned with the box to the Sheraton Inn River House Hotel while petitioner drove home (Tr. 344-345).

Aguilar and Ybanez entered Fuentes' motel room with Ybanez carrying the box. Ybanez told Fuentes, "[h]ere it is" (Tr. 261-262). While Zapata was testing the powder contained in the box, Fuentes asked Ybanez whether he could speak with his brother-in-law about arranging to purchase a larger quantity. Ybanez said, "[t]he man just brought the cocaine over and he had to leave, so I can't let you talk to him now, but we will work it out later" (Tr. 262). After Zapata confirmed that the powder was cocaine, Ybanez and Aguilar were arrested (Tr. 262-263). Petitioner was arrested at his home less than an hour later (Tr. 345).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Relying on *Burks* v. *United States*, 437 U.S. 1 (1978), and *Greene* v. *Massey*, 437 U.S. 19 (1978), petitioner contends (Pet. 8-22) that the Double Jeopardy Clause precludes retrial following the reversal of a conviction based upon the improper admission of evidence unless the remaining evidence is sufficient to support conviction. He therefore maintains that the court of appeals erred in refusing to review the sufficiency of the lawfully admitted evidence at his first trial. Petitioner's arguments lack merit.

It has long been established that retrial is generally allowed when a defendant's conviction is reversed on appeal. See *United States* v. *DiFrancesco*, 449 U.S. 117, 131 (1980); *United States* v. *Ball*, 163 U.S. 662, 672 (1896). *Burks* and *Greene* "carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial" (*Tibbs* v. *Florida*, No. 81-5114 (June 7, 1982), slip op. 10). In *Burks*, this Court held for the first time that retrial is barred when a federal conviction is reversed for insufficient evidence. In *Greene*, the same principle was held applicable to the states, and in that case the Court expressly declined to comment upon the issue now raised by petitioner (437 U.S. at 26 n.9).

There is nothing in the reasoning of *Burks* or *Greene* that supports petitioner's argument. Noting that a new trial is not permitted when the trial court recognizes that the evidence is insufficient and therefore grants an acquittal, the Court in *Burks* stated (437 U.S. at 11; emphasis in original) that "it should make no difference that the *reviewing* court,

rather than the trial court, determined the evidence to be insufficient." The Court elaborated (*id.* at 16; emphasis in original):

> [S]uch an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

This reasoning is obviously inapplicable where, as here, a defendant contends following the reversal of his conviction for error in the admission of evidence that the remaining evidence was legally insufficient. In that situation, the defendant would not necessarily have been acquitted if the trial judge had not erred. On the contrary, if the trial judge had excluded the evidence subsequently held to have been admitted improperly, the prosecution might have been able to establish a proper basis for admitting that evidence or the prosecution might have been able to introduce other evidence of similar import. In the present case, for example, Aguilar, who had already pleaded guilty, could have been granted immunity and questioned concerning the crime.

Not only is the reasoning of *Burks* and *Greene* inapplicable in a case such as this, but barring retrial under the circumstances presented here would have untoward consequences. The government would be compelled to introduce evidence so that retrial would not be precluded if the trial judge's rulings on important items of proof were held on appeal to have been error. The government would also feel obligated, whenever possible, to establish alternative bases for admitting all critical pieces of evidence. The result

would be a waste of scarce judicial and prosecutorial resources, increased delay in the criminal process, and a greater likelihood of jury confusion resulting from the introduction of cumulative evidence.

For these reasons, the Fourth and Ninth Circuits, as well as the Fifth, have rejected the double jeopardy argument upon which petitioner now relies. *United States* v. *Harmon*, 632 F. 2d 812 (9th Cir. 1980); *United States* v. *Block*, 590 F. 2d 535, 543-544 (4th Cir. 1978).

2. Petitioner mistakenly relies (Pet. 14-16) upon *United States* v. *McQuilkin*, 673 F. 2d 681 (3d Cir. 1982), and *United States* v. *United States Gypsum Co.*, 600 F. 2d 414 (3d Cir.), cert. denied, 444 U.S. 884 (1979). In those cases, the court of appeals did not review the sufficiency of the properly admitted evidence following the reversal of convictions based upon error in the admission of certain items of proof. Instead, the court, following reversal of convictions on grounds unrelated to the admission of evidence, reviewed the sufficiency of *all the evidence* admitted at the first trial.

In *McQuilkin*, the defendants' convictions before a magistrate were reversed by the district court on the ground that the defendants' statutory right to a jury trial had been denied (673 F. 2d at 682). The defendants then moved for dismissal of the indictment on double jeopardy grounds, but the district court found that the evidence against all but one of them was sufficient and remanded for a new trial. On appeal, the court of appeals held (*id.* at 683-687) that the defendants could appeal the district court's decision under *Abney* v. *United States*, 431 U.S. 651 (1977) (pretrial order denying motion to dismiss on double jeopardy grounds appealable under 28 U.S.C. 1291). The court then concluded (673 F. 2d at 687-688) that the evidence at the first trial was legally sufficient.

In *United States Gypsum Co.*, convictions were reversed based upon an erroneous jury instruction and an improper ex parte meeting between the trial judge and the jury foreman. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), aff'g 550 F. 2d 115 (3d Cir. 1977). On remand, the defendants' motion to dismiss the indictment on double jeopardy grounds was denied by the district court, and the court of appeals affirmed, holding that the evidence at the first trial was sufficient (600 F. 2d at 417-420).

Here, by contrast, petitioner did not contest the sufficiency of the evidence (including the confession) admitted at his first trial (see page & note 1, *supra*). If he had raised such a claim, the court of appeals would undoubtedly have considered it, since a reversal on that ground, unlike a reversal for improperly admitted evidence, would have barred reprosecution. Instead, however, petitioner merely asserted that the evidence was insufficient without the confession. Since that assertion, even if factually correct,[2] would not have precluded retrial, the court of appeals properly declined to pass upon it.

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[2]In fact, the remaining evidence, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80, 1942)), was ample. Although petitioner was never shown to have been present when cocaine was in plain view, the evidence of his intimate association with Aguilar and Ybanez, who had travelled from Texas to petitioner's home and place of business in Miami for the sole purpose of effecting a sale of a large quantity of cocaine, coupled with the proof of petitioner's arrival at the time set for the drug transaction and his delivery of the box containing a large amount of cocaine, provided an adequate basis for the jurors to conclude rationally that guilt was established beyond a reasonable doubt. See *United States* v. *Grayson*, 597 F. 2d 1225, 1229 (9th Cir.), cert. denied, 444 U.S. 875 (1979); *United States* v. *Ochoa*, 609 F. 2d 198, 203 (5th Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CASE NO. 81-2286

in the Supreme Court of the United States

LUIS OSCAR SARMIENTO-PEREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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STATEMENT

On June 14, 1982, the Petitioner herein filed with this Honorable Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

After several extensions of time, the Brief for the United States in opposition was filed. Said Brief was received by counsel for the Petitioner on September 8, 1982.

Petitioner now files with this Court his Reply Brief.

ARGUMENT

POINT I

THE SUPREME COURT OF THE UNITED STATES SHOULD DISREGARD THE VARIOUS ALLEGATIONS MADE BY RESPONDENT IN THAT PORTION OF ITS BRIEF REFERRED TO AS "STATEMENT" IN THAT THESE ALLEGATIONS ARE INACCURATE, AND RESPONDENT RECITES EVIDENCE THAT SHOULD HAVE BEEN EXCLUDED AT TRIAL AND EVIDENCE AND TESTIMONY THAT WAS EXCLUDED AT TRIAL.

Respondent's Brief in Opposition would have this Court believe that Petitioner did not contest the sufficiency of the evidence presented against the Petitioner when the inadmissible confession was included. (See page 2, n. 1, Respondent's Brief in Opposition.)

It is respectfully urged upon this Court that the Brief in Opposition has quoted Petitioner's Brief out of context and thus came to an erroneous conclusion.

Point IV (Pet. App. 17-20) argued to the Court of Appeals that the evidence admitted against Petitioner at trial, aliunde the hearsay, was insufficient to support a conviction. Petitioner went on (Pet. App. 18, 19) to recite the nature of the competent and incompetent evidence introduced against the Petitioner. As part of this recitation, Petitioner cited the alleged confession as an example of the incompetent and inadmissible evidence introduced at trial by the Government and allowed to go to the jury.

Counsel for the Respondent fails to see that Petitioner's argument as to the confession encompassed several points:

1. The confession was used by the Government as its only and crucial piece of substantiai, independent evidence to establish the existence of a conspiracy and Petitioner's participation in said conspiracy. This, of course, violated the proscription of *United States u. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) and *United States u. James*, 590 F.2d 575 C.A. 5 (1979).

2. By permitting the Government to use the confession as aforementioned, the confession became a vehicle which allowed the Government to present to the jury, an overwhelming amount of otherwise inadmissible hearsay evidence against the Defendant, thus the inadmissible hearsay confession "boot strapped" the other inadmissible hearsay testimony.

3. The confession was not a statement made during the course of and in furtherance of the conspiracy, Federal Rules of Evidence 801(d)(2)(E) 28 U.S.C. 8.

In addition to the inaccurate assumptions stated above, the Brief in Opposition then goes on to recite to this Court all the excludable hearsay evidence (Resp. Brief, p.3, ¶ 2). The only direct evidence recited by the Government is:

1. Petitioner met Aguilar and Ybanez at Miami International Airport and drove them to his residence, and

2. Petitioner drove to the parking lot of a Ramada Inn where Aguilar took a box from the trunk of Petitioner's car (Resp. Brief, p.4, 5).

The Respondent, in its zeal to impress the Court, even recites facts that the jury was admonished to disregard. The alleged conversation between Zapata and some unknown person (Resp. Brief p.5) was stricken by the Court (Tr. 298, 299).

POINT II

THE GOVERNMENT HAD AMPLE TIME TO PREPARE ITS CASE AND ESTABLISH A PROPER BASIS FOR THE EVIDENCE IT INTENDED TO INTRODUCE AND/OR INTRODUCE OTHER EVIDENCE OF SIMILAR IMPORT.

The attention of this Honorable Court is respectfully called to Point III of Appellant's Brief submitted to the United States Court of Appeals for the Fifth Circuit (R. App. 1-6).*

It was pointed out to the Court of Appeals and is strongly urged upon this Court that the Government had sufficient notice of the infirmities and/or deficiencies of the evidence in its case and ample time to cure said defects.

One and one-half months before the actual start of trial, counsel for the Government indicated to the Court that it would seek a grant of immunity for Roberto Aguilar. This occurred on June 11, 1979 (R. App. 1). On July 23, 1979, at the pre-trial ("James") hearing and at the trial, the Government still had not obtained immunity for Aguilar, the witness upon which the entire case for the Government rested (R. App. 2, 3).

It has been held that where the prosecution either fully presented its case or had ample opportunity to do

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*Numbers in parentheses preceded by R. App. refer to the Appendix of Petitioner's Reply Brief.

so, the prosecution should be held liable for its failure to adequately meet its burden. That is, the prosecution should be afforded only one fair opportunity to present a prima facie case against a criminal defendant. *United States v. Wiley*, 517 F.2d 1212, 1200 n. 39 C.A.D.C. (1979) (R. App. 456).

In a last comment about the evidence, the Government in its Brief in Opposition, urges this Court to conclude that Petitioner's close association with his brother-in-law and his proximity to a drug transaction is sufficient evidence of Petitioner's guilt beyond a reasonable doubt. (See page 9 n.2 Resp. Brief in Opposition).

In *United States v. Sarmiento-Perez*, 633 F.2d 1092 C.A. 5 (1981) (Pet. App. 32-33), the Court of Appeals stated:

> "DEA surveillance agents observed the defendant Sarmiento-Perez pick up Aguilar and Ybanez at Miami International Airport and drive to Sarmiento-Perez' residence where Aguilar and Ybanez picked up a white Buick and departed. The following evening, agents observed Sarmiento-Perez arrive at the Sheraton Motel, stay a few minutes, then drive to the Ramada Inn parking lot. Shortly thereafter, Aguilar and Ybanez were seen arriving at the Ramada Inn parking lot. Aguilar was observed retrieving a box from the trunk of Sarmiento-Perez' Cadillac. (No evidence—other than the confession referred to below—shows that Sarmiento-Perez had placed this box in the trunk of his car or had reason to know of its

contents.) Thereafter, Aguilar and Ybanez drove from the Ramada Inn parking lot to the Sheraton Motel where the sale was completed and Aguilar and Ybanez were arrested. The box was later found to contain cocaine (pretermitting chain-of-custody and inadmissible, hearsay contentions.)"

It is well established that knowing participation in a criminal enterprise cannot be proven solely by association with other persons involved in said enterprise, family relationships or mere proximity or even actual presence at the scene of a crime. *United States v. Caro*, 569 F.2d 411, 418 C.A. 5 (1978); *United States v. White*, 569 F.2d 263, 268 C.A. 5 (1978).

CONCLUSION

Wherefore, Petitioner prays that the Petition be granted by this Court.

Respectfully submitted,

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POINT III

A RETRIAL OF THE APPELLANT WOULD VIOLATE THE APPELLANT'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The original trial of the case at bar was set according to the certified official docket (part of this record on appeal) on February 26, 1979 for April 9, 1979. Thereafter, the record reveals that the case was reset for May 14, 1979. A jury was actually selected that day and they were given instructions to return June 11, 1979. The record of official proceedings for June 11, 1979 reveals the following notation:

"6/11/79

(ODC/pcc) RE CALLING CASE FOR TRIAL AS TO DEFT. SARMIENTO-PEREZ.
Case called for trial. Out of presence of jury, government stated that co-counsel Michael Striar represented co-deft. Ybanez who has pled guilty and is now co-counsel for deft. Perez and a poss. conflict now exists. Court stated that if Ybanez testifies, the poss. conflict will be taken up at that time. Government's motion for a one day continuance pending application for immunity for testimony of co-deft. Aguilar, denied. Defendant's oral motion for change of venue to Florida denied along with motion to quash jury jury panel. Defendant's motion to quash or in the alternative for supplemental voir dire granted only as to the request for

supplemental voir dire. Out of presence of jury, Robert Aguilar called to the stand for the purpose of ascertaining if he will invoke the 5th amendment. Court recessed until Aguilar has had an opportunity to confer with his atty. After reconsideration, Court granted defendant's motion to quash and set jury selection for 10:00 a.m., July 17, 1979. Jury discharged prior to being sworn."

Thus on June 11, 1979 the Government was fully aware that the testimony of Roberto Antonio Aguilar could not be obtained until and unless the Government could obtain immunity for said individual. The jury was discharged as stated above.

The jury was selected on July 18, 1979 and trial commenced on July 23, 1979. The certified official docket sheet describes the proceedings of that day:

"7/23/79

(ODC/pcc) RE FIRST DAYS TRIAL.
Out of presence of jury, government stated that at the time of arrest of deft. Robert Aguilar, a written statement was given implicating deft. Perez. Aguilar advised the government that he will not now testify. Govt. requested that Aguilar be placed on the stand and ordered to testify by the Court to determine the unavailability of the witness. Court will take up this matter after the noon recess. Court stated it was satisfied that no conflict exists by Mr. Striar coming into this case as co-counsel for deft. Perez. Defendant's motion to quash

jury denied. and Court will prepare and file a memorandum. Jury sworn. Defendant invoked the Rule. Witnesses sworn. Ismael Fuentes excused from the Rule for the govt. Government's wit: (1) Out of presence of jury, a James Hearing was held. Court stated there is substantial independent evidence of a conspiracy and the testimony of co-defendants will be permitted to go to the jury. Government's wit: (2) Out of presence of jury, Roberto Aguilar called to the stand to determine whether or not he would testify. Aguilar stated that on the advice of his counsel he was refusing to testify even after being Ordered by the Court to do so. Court declared the witness unavailable and stated his written statement would be admitted into evidence. Government's wit: 3 & 4 Trial not concluded. Court recessed until 9:00 a.m., July 26, 1979."

Almost one and one-half months after the Government was advised by Aguilar that he was invoking the Fifth Amendment to the United States Constitution in order not to testify the Government still had not obtained a grant of immunity for Aguilar and thus was unable to produce his testimony at trial.

In addition to this glaring deficiency in the Government's case, which formed the basis of the opinion of this court (see *United States v. Sarmiento-Perez, supra*) this court noted that the government was not prepared properly in regard to the evidence involving the contraband. (R. 24)

Thus, it is pointed out now that the Government had ample time to prepare the prosecution and more than a sufficient opportunity to adequately present its case against Sarmiento-Perez to the jury. The Government cannot argue that it was improperly denied the opportunity to present the entire case against the defendant.

In discussing the effect of the Government having the opportunity to present a prima facie case the Court stated in *United States v. Wiley*, 517 F.2d 1212, 1200 n 39 C.A.D.C. (1975):

> "We are cognizant that in most circuits the decision to permit a new trial generally turns on whether the Government could supplement its inadequate case if allowed to retry the defendant. See, e.g., *United States v. Koonce*, 485 F.2d 374, 382 (8th Cir. 1973). Where the Government has put in all of its evidence or the Court of Appeals concludes that there is no realistic possibility of remedying the deficiency, the case is remanded with instructions to dismiss the indictment. See, e.g., *United States v. Snider*, 502 F.2d 645, 656 (4th Cir. 1974); *United States v. Edmons*, 432 F.2d 577 (2d Cir. 1970); *Murray v. United States*, 403 F.2d 694 (9th Cir. 1968). In some cases a mere possibility of obtaining sufficient evidence has been found adequate to make a retrial just and appropriate. See, e.g., *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973); *United States v. Morado*, 454 F.2d 167 (5th Cir.), *cert. denied* 406 U.S. 917 (1972), 92 S.Ct. 1767, 32

L.Ed.2d 116; *Beltran v. United States*, 302 F.2d 48, 52 (1st Cir. 1962).

"We have carefully considered the approach employed in these and numerous similar cases and conclude that in general it is not in the interest of justice to accord the prosecution more than one fair opportunity to present a *prima facie* case against a criminal defendant. To do so would enable the prosecution to utilize evidence presented by the defense to build a *prima facie* case at retrial and to correct tactical mistakes in order to enhance the prospects of obtaining and sustaining a conviction. Moreover, confining the Government to a single prosecution furthers sound judicial administration by creating incentives for thorough preparation and careful presentation of the Government's case. These considerations coupled with the policy against multiple prosecutions, the policy underlying Rule 29, and the interest in avoiding disparate treatment of similarly situated defendants (see note 35 *supra*) outweigh the Government's interest in obtaining convictions.

"Our approach is comparable to that taken in some prior circuit court opinions. *See, e.g., United States v. Bass*, 490 F.2d 846, 852-53 (5th Cir. 1974) (ruled district judge may refuse to permit a retrial 'if he finds from the record that the prosecution had the opportunity to develop its case . . . at the first trial.'); *United States v. Smith*, 437 F.2d 538, 542 (6th Cir. 1970) (retrial 'hinges, in our view, on whether the Government was unfairly prevented from

producing competent evidence'); *United States v. Howard*, 432 F.2d 1188, 1191 (9th Cir. 1970) (concurring opinion of Ely, J. in which Hufstedler, J., joined) (where the prosecution 'had the opportunity fully to develop its case, or, in fact, did so' and '(i)f it did, or if it appears that it was responsible for its failure adequately so to do, then it is not ordinarily fair that the successful appellant should be required to undergo another trial')."

The prosecution should not be afforded a second opportunity to supply evidence which it failed to muster in the first proceeding. *Burks v. United States*, *supra*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 24 day of September, 1982 to: Solicitor General of the United States, Department of Justice Building, Washington, D.C. 20530.

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